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REPORTS

OF

CASES

ARGUED AND DETERMINED IN

THE COURT OF KING's BENCH,

TOGETHER WITH SOME CASES,

IN THE

HIGH COURT OF CHANCERY,

IN MICHAELMAS, HILARY, EASTER, AND TRINITY TERMS,

BEING THE WHOLE OF THE FORTY-FOURTH YEAR OF THE REIGN OF GEORGE III. (1803 AND 1804.)

WITH

TABLES OF THE NAMES OF THE CASES AND OF THE PRINCIPAL MATTERS.

BY JOHN PRINCE SMITH, ESQ.

OF GRAY's INN, BARRISTER AT LAW.

VOL. I.

SECOND EDITION, CORRECTED.

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PREFACE.

THE following work is offered to the public as part of a plan in which the *Editor* has engaged for giving to the profession the earliest information concerning *the decisions of the Court of King's Bench*, and occasionally of other Courts, together with an *Abridgment of the Statutes* as they are passed, and also *some other articles on legal subjects of a miscellaneous nature.** While the *Editor* feels grateful for the encouragement which his plan has hitherto received, he is not unsolicitous as to the reception of this part of his work, now that it assumes the form of a Volume of REPORTS to be continued annually; in which character he ventures to submit it to the candour of a liberal profession, in the hope that they will receive it with that favour which they usually bestow on every endeavour to be useful, and that indulgence which has been always granted to the well-intended labours of every early candidate in the profession.

* These are published monthly under the title of the LAW JOURNAL.

The nature of the work and the manner of its execution will doubtless be ascertained the most accurately by the perusal of it, but it may yet not be improper in this place to state the editor's own design. Were it possible consistently with other requisites to give the reader in all cases the same advantages with him who hears the decisions, it would be desirable to relate every thing as it passed, and to record every word as it was delivered. But to do this in all cases would be obviously inconvenient, and many times wholly unnecessary. A medium must therefore be adopted, and the editor has studied brevity at the same time that he has endeavoured to attain accuracy and perspicuity. With this view he has abridged, as much as he could safely venture to do, the statements of the cases; which are taken from the paper books or records of the court, where that could be done, and where not, as in cases of new trials, the facts have been collected from the briefs and from short-hand notes of the statements made upon the motion and of the report of the Judge. The arguments of the counsel are stated very shortly in most cases, and in some wholly omitted. The judgment of the court is related very much at length, not, in all cases, according to the words, which no reporter has ever yet had the hardihood to profess, but rather according to the spirit and substance.

If these rules have not been invariably observed, the expeditious mode of publication, *monthly*, must afford some excuse, and it may be said of a long case as *Howel* once said of a long letter, that the writer had not time to make it shorter. An apology is also due for some *anonymous* cases, and in future it will be the *Editor's* endeavour to insert the names of the parties in every case reported. As to the order of reporting them, some cases have been inserted out of their chronological order, because the necessary papers were procured

first in point of time; and it is presumed, there is no real inconvenience to the reader in this.

As these reports may probably fall into the hands of many young students, some observations by way of caution in the use of them may not be deemed unnecessary, since they equally concern the improvement of the reader and the reputation of the editor.

In stating the judgments of the courts the greatest accuracy is certainly requisite, but to be infallible does not belong to human nature; and if Judges are supposed to have erred, it has most frequently been because reporters have misunderstood and consequently misrepresented them. Indeed in deciding particular cases, it must be observed, that it is very difficult both for the Judge to lay down, and the reporter to state with accuracy the general rules and principles which lead to the decision, with all the qualifications which ought to be attached to them. These can only be collected from a due consideration of the nature and all the circumstances of the case. It is therefore very seldom if ever safe to take up a garbled sentence, or an *obiter dictum* as an authority. It is always rash to do so without reference to the subject matter to which it is applied. An error by which the perverseness of some understandings, and the subtilty of others, may be led into the wildest absurdities. Acts of parliament may be discussed upon the literal meaning of every word as it stands in the context; for the makers of them have regard to general cases, and every possibility of event is presumed to be foreseen by the legislature; but *cases* are, in general, decisions upon particular circumstances, which it frequently happens cannot be safely extended into very general rules. The nature of the two subjects therefore points out a difference in the mode of construing them, and the reporter can do but little for the advancement of science if his readers do not minister to themselves in weighing the whole facts of

each case, rather than the literal expressions of particular sentences, with perspicacious judgment and cautious discretion.

The editor has only to observe, that he has been assisted with the cases in the Court of Chancery by a friend on whose accuracy he has the greatest reliance, and whom he should be happy to thank publicly by name, but that at present he is restrained. The reasons for publishing these Reports, it is not now necessary to state; they have been explained before; but it may be convenient to have two accounts of decisions to confirm each other; some cases will be found not reported by any co-temporary reporter; and the nature of the publication in which they were originally inserted, and will in future be continued monthly, is different from any which has previously been attempted.

Serjeant's Inn, Fleet Street,
November 15, 1801.

JUDGES

DURING THE TIME OF THESE REPORTS.

HIGH COURT OF CHANCERY.

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COURT OF KING's BENCH.

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ATTORNEY GENERAL.

THE HONORABLE SPENCER PERCEVAL.

SOLICITOR GENERAL.

SIR THOMAS MANNERS SUTTON, KNT.

A

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CASES

ARGUED AND DETERMINED

In the Court of King's Bench,

IN MICHAELMAS TERM,

In the 44th Year of *George* III.

BUNN (*Executor of* BUNN) *against* GUY, *and others.*—*Monday, November* 7. 1803.

AN agreement to relinquish to others the business of an attorney and solicitor, and permit them to use the name of the person so relinquishing business, he not intermeddling therewith, is valid in law.

Also, where there are several considerations mentioned in a deed, though one is bad, the deed is good for the rest, unless where the deed is rendered void by act of parliament.

BUNN versus GUY.

THIS was a case sent for the opinion of this court out of the high Court of Chancery, as follows:

Mr. Charles Carpenter having, before and on the 6th of December, 1797, been an admitted and practising attorney and solicitor of the several courts in London, agreed with Mr. John Bunn, since deceased, and Mr. John Guy, who had also been previously admitted as such attornies and solicitors, and were at that time practising in those characters, in consideration of the sums of money, and annuity, and other considerations after men-

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tioned, to relinquish and make over his practice and business to them upon the terms and conditions specified in the articles of agreement herein after set forth. Accordingly, on the 6th day of December, 1797, by article of agreement, duly stamped, sealed, and executed by the said Charles Carpenter, in consideration of the several sums of money and annuity herein after mentioned to be paid and secured to him, agreed that he would, on the 25th day of the same month of December, relinquish and make over unto the said John Bunn and John Guy all benefit and advantage of his business as an attorney, solicitor, and conveyancer, so far as respected his practice in the profession of the law, within the city of London, and the distance of 250 miles from thence, and all the business of the said Charles Carpenter, as agent for any attorney, solicitor, or conveyancer, in this kingdom. That he the said Charles Carpenter would not, after the said 25th day of December, practice as an attorney, solicitor, or conveyancer, or as agent for any attorney, solicitor, or conveyancer, within the limits aforesaid; and that he would endeavour, by every means in his power, to influence and induce as many of the clients of the said Charles Carpenter as he could (whose business he thereby agreed to give up and relinquish) to become the clients of the said John Bunn and John Guy: that he would, by personal application, writing circular letters, or otherwise, introduce the said John Bunn and John Guy to the business of all such clients of the said Charles Carpenter as aforesaid; and also would permit them to practice as attornies, solicitors, conveyancers, or agents, under the style and firm of Carpenter, Bunn, and Guy, for the space of one year, and after the expiration of that year for one year more, (but no longer) if the said John Bunn and John Guy should deem it essential to their interests to continue so long to use the name of the said Charles Carpenter in such firm: that the said Charles Carpenter would not claim or demand any share in the profit, or advantage to arise by such business, except the advantage to be derived from attendance by the

firm of Carpenter, Bunn, and Guy, on account of or incident to any actions or suits which might be transacted for the proprietors of Drury-lane Theatre during the use of the said Charles Carpenter's name, he being indemnified against all losses and risks to arise therefrom; and that the said John Bunn and John Guy should carry on such business totally independent of the said Charles Carpenter: and, in consideration of the said premises, the said John Bunn and John Guy, jointly and severally agreed with the said Charles Carpenter for the payment to him, on the said 25th day of December, of the full sum of 1000l., and for effectually securing to him the further sum of 1000l. on the 25th day of June, 1800, with interest half-yearly, until the principal should be paid: and also, that they would grant and effectually secure unto the said Charles Carpenter, his executors and assigns, a clear annuity or yearly sum of 600l. for the term of seven years, to commence from the said 25th day of December, 1797, and to be payable half-yearly during such term: and that they the said John Bunn and John Guy, so long as they should use the said C. Carpenter's name in the firm, would indemnify him from all losses and risks, and particularly would not draw, accept, indorse, or negociate any bill or note, or become bail or surety for any person, and that if, contrary to such agreement, they should become, or undertake to become bail, the general partnership, fund, and property of the said John Bunn and John Guy should be considered as primarily liable to make good to the said Charles Carpenter all losses and expences which he might incur by reason thereof; and all the other property of the said John Bunn and John Guy should be secondarily liable to make good the same: and it was by the said articles declared and agreed, that if the said John Bunn and John Guy should make default for twenty-one days in payment of the sum of 1000l. so agreed to be paid on the 24th day of June, 1800, or the interest thereof, or the said annuity of 600l., on the days and in the manner therein mentioned, then, and in any or either of those

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cases it should be lawful for the said Charles Carpenter, by giving one month's previous notice, again to resume the business therein agreed to be relinquished, and to conduct and carry on the same for his own use and benefit, exclusive of the said John Bunn and John Guy, as if the said agreement had not been made.

In pursuance and execution of the said articles, the said John Bunn and John Guy, together with Benjamin Bunn and Thomas Winsloe, their sureties, by bond or obligation, dated the said 6th day of December, 1797, became, and were severally and jointly bound to the said Charles Carpenter in the penal sum of 10,400l., with a condition to be void on performance by the said John Bunn and John Guy, their heirs, executors, or administrators, of the covenants and agreements in the said articles contained; and the same parties, by another bond or obligation dated the 27th day of December, 1797, became jointly and severally bound to the said Charles Carpenter in a like penal sum of 10,400l, with a condition to be void on payment to the said Charles Carpenter of the sum of 1000l. on the 24th day of June, 1800, with interest, half-yearly, until paid; and also for the payment to the said Charles Carpenter of the further sum of 4,200l. by half-yearly payments of 304l., each, being the half yearly payments of the said annuity of 600l., in the said articles of agreement mentioned. A large part of the money, stipulated by the said articles and bonds to be paid to the said Charles Carpenter, remaining unpaid,

The question referred by the Lord Chancellor to this court is, whether such contract or agreement is good in law, so that the said Charles Carpenter could recover such money in an action against the said John Bunn and John Guy?

This case was argued in last Trinity term by MARTIN for the plaintiffs, and MARRYAT for the defendants.

Arguments for the plaintiff.—The question for the court is, whether this be a legal debt, for if so, it will take place of all other demands upon the estate. But

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the contract upon which it is founded is void, for it being one entire contract, though consisting of three parts, if either of them be bad the whole is void. There are three things included in this contract, namely, 1st, the relinquishment and sale of the business; 2dly, the authorizing of the parties to practise in the name of Carpenter and Co.; and 3dly, the recommending them to Carpenter's clients. It is clear, that the first, if it stood alone, is not a good consideration for an assumpsit. It is not like the sale of a trade and shop, because that may have an *ideal* value attached to it on account of the situation. Here the personal character of Carpenter is the only inducement for the clients to employ him; but *that* he cannot transfer, and therefore, by relinquishing the business, he gives nothing as a consideration for the promise.

[Lord ELLENBOROUGH, C. J. "But the relinquishment of the business raises at least a consideration of inconvenience to one party, which is sufficient to create an assumpsit, although it produce no advantage to the other party."]

In that view it may be sufficient to raise an assumpsit, yet it is void upon the general principles of common law, and that upon grounds of public policy, it being against the interest of the public. And, though the decisions on that head have, mostly, been in equity, yet the principle is equally good at law; *Collins* v. *Blantern.** Lord C. J. Wilmot cites the *Digest*, lib. 5. tit. 5., and says, that "a contract to tempt a man to transgress the law, to *do that which is injurious to the community*, is void by the common law, and the reason why the common law says such contracts are void, is for the public good."

The authorizing a party to practise generally as an attorney in his name is unlawful, because there can be no *general* authority to an attorney to practise in the name of another, but, in every particular suit, there must be a written authority.

* 2 *Wilson* 341; and see 15 *Vin. Abr.* 264, &c.

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BUNN versus GUY.

[Lord ELLENBOROUGH. "Is there any other permission than to practice under the *firm* of *Carpenter, Bunn* and *Guy*? Now, however that may be, yet they cannot put those names upon the records of the court, as the names of the attornies in any cause."]

Then it is illegal on another ground, for it is contrary to the policy of the law to receive money for the interest of any one in procuring an office of trust for another, which the business of an attorney closely resembles. *Morris* v. *M'Cullock*,* and other cases. And here, as appears from that case, it would be within the statutes 5th and 6th *Edward VI.*, if it were not for the necessity of going through the ceremony of admission. This is also a bad consideration on account of the fraud which it induces the parties to practise; for, if *Carpenter* is to recommend *Bunn* and *Guy*, that could only be available by representing them as fit persons to be intrusted; and although they should be so in fact, yet it is not their *merit* and *fitness* which operates as the inducement to *Carpenter* for recommending them, but the mere pecuniary consideration and the compulsion of the agreement into which he has entered, and from which he cannot retract.

[Lord ELLENBOROUGH, C. J. "Must it not be presumed that the agreement is with this limitation, that they shall continue worthy? If they had *misbehaved* themselves, would it not have been an answer to an action for not recommending them?"]

In *Blackford* v. *Preston*,† it was said by the court, that no money consideration ought to influence the recommendation of persons to public offices of trust.

Arguments for the defendants.—This is a case of great general importance; for the doctrine contended for, on the part of the plaintiff, is applicable to almost all kinds of engagements between man and man. The argument against this contract is, not so much that it is, necessarily

* *Ambler*, 432. † 3 Term. Rep. 89.

and according to its original foundation, against public policy, and, therefore, bad; but that it is possible to render it so, by *abusing it*. The consequence of holding this a sufficient cause for vacating contracts would be, that it would be unnecessary for the legislature to interfere in any cases whatsoever, for the restraining of contracts operating in any wise against public policy; and the courts of law would supply the place of the legislature, upon all cases of public policy. But this is by no means within the power of a court of law; for there are many things, which, though obviously against public policy, are yet permitted to be done by law, because they are not forbidden by any positive statutes; whilst there are many others, for the restraining of which it has been thought necessary to enact particular statutes; such, for instance, as *wager policies*, the recovery of money won at play, and other things of the like nature. But these statutes would have been unnecessary, if the argument on public policy were carried to the extent contended for. In this agreement there is nothing which the courts consider as fraudulent. There is neither *suppressio veri* nor *expressio falsi*. The sale of the good-will of a business has always been allowed, and *good-will, ex vi termini*, necessarily implies the recommendation or good offices of the person retiring from business, and no objection has been ever made to it on that account. In *Crespigny* v. *Wittenoom*,* it was held that an annuity granted in consideration of the grantee's giving up his business of a *proctor*, which is very similar to that of an attorney, was good.

1803.

Bunn versus Guy.

[Lawrence, J. "That case turned wholly upon the construction of the annuity act; and the point made *here* was not then agitated."]

[Lord Ellenborough, C. J. "Here the party retires, and yet holds it out to the world that he still continues in the business, which is to a certain degree a deception upon the public."]

* 4 Term Rep. 790.

1803.

BUNN versus GUY.

In *Mitchell* v. *Reynolds*, PARKER, C. J.* in his fourth reason for the judgment of the court, goes very fully into the grounds for supporting bonds and agreements for the good-will of a business, and his reasoning applies very strongly to this case. That was a case of a baker, which, though not a trade which is of equal importance in all respects to the profession of an attorney, is yet of great importance to the public. For a brewer or baker may upon the very same principles which apply to an attorney be said to enter into an immoral contract, when he agrees to recommend another to business; for skill is requisite in those businesses, and the public may be greatly prejudiced by the want of skill and honesty in the persons exercising them. But this agreement does not compel him to give a *false* recommendation: for supposing *Carpenter* had been asked, whether the parties were acquainted with the course of business in parliament, or before the commissioners of sewers, it would not have been a breach of the agreement, if he had answered that he did not know whether they had ever had any business of that kind.

[LORD ELLENBOROUGH, C. J. "But he is to be considered as acting when in fact he does not."]

That also often occurs in the case of a banker; yet it has never been thought a fraud upon the public to continue the name of a man in the *firm*, though he is dead, as has been the case in *Child*'s house for many years. Neither does it make any difference, that the banker, in such cases, is responsible for monies lodged with the house while his name is in the firm; for *Carpenter* would be responsible, in like manner, for the mismanagement of the firm of *Carpenter, Bunn* and *Guy*.

[LORD ELLENBOROUGH, C. J. "As far as pecuniary indemnification goes he may be answerable; but does he not hold out a deception to the client who confides in his skill?"]

* 1 *P. Williams*, 181, 191. See *Colmer* v. *Clark*, 7 *Mod.* 230; and *Davis* v. *Mason*, 5 *Term. Rep.* 118.

1803.

Bu*ller* versus Gov.

So, one banker may give better advice respecting the laying out of money than another. And, in most cases of retiring from business, the *seniors*, who are the most skilful, are those who retire; but yet it has never been objected, that they practise fraud, by continuing their names in the firm. In the case of an attorney, there is even less reason, than in other cases, to apprehend mischief from his want of skill, because he is compelled to go through a regular clerkship, and to be admitted before the judges; and the statute, 2 *Geo. I.* c. 23. s. 6 and 8, prescribes also an examination. So far from one attorney's acting in the name of another being unlawful, the penalty only attaches upon the giving liberty of practising to one who is not admitted. To return to the ground of policy, *Hutton* v. *Lewis** was a case upon the annuity act, where a schoolmaster sold his business, yet no objection was made to the contract, although the court would be very careful of the morals and education of children. That was an argument upon demurrer, and though the case was decided principally upon the annuity act, yet it might, even *in error*, have been argued and decided upon this general ground of policy, if the contract had been illegal. All the cases that have hitherto occurred have turned either upon the 5th and 6th *Edward VI.*, or upon the ground of the contract being an infringement of some private contract affecting the party.

In *Blackford* v. *Preston*,‡ there was a bye-law, and also a charter-party, by which the plaintiff had precluded himself from filling the office of captain. Other cases went upon the deceit practised on the crown. *As* where a mast-joiner in one of the dock yards, had procured himself to be superseded, when he was not in a situation to require it. There, two objections were made: first, if he was not supersedable, it was not a good consideration; and, if he was supersedable, there was *no consideration moving from him*; *Parsons* v. *Thompson*.† If the possibility of *abuse* is

* 5 Term. Rep. 639. † 8 Term. Rep. 89. ‡ 1 *H. Black.* 329.

1803.

BURN versus GUY.

sufficient to vacate the contract, it would operate equally against the sale of *advowsons*, which is always allowed.

For the plaintiff, in reply. If the argument were admitted in its full extent, that courts of justice should not decide merely upon grounds of public policy, because it is an interference with the province of the legislature, it would follow that the courts could not restrain any contracts whatsoever, upon grounds of public policy, except such as come under the special provisions of some act of parliament. But in *Garforth* v. *Fearon*,† which was the case of an agreement to appoint such a deputy as should be nominated by *Garforth*, the court held, that it was not only within the statutes, but was bad at *common* law. That case was upon assumpsit, and, here, the question stands precisely as if an action of assumpsit had been brought. Here the contract is in itself immoral, because *Carpenter* holds out to the world that he is to act in the firm and exercise his skill as an attorney, when he agrees with the firm not to act at all. In this there is something of *fraud*, with respect to *third* persons. In *Harrington* v. *Du Chatel*,* Lord Rochford was desirous of making a provision for a person who was his tutor, and, for an annuity granted to him, recommended a person to be a page of the presence. Lord THURLOW, C. in giving judgment, expressed doubts, whether it might not have been made a defence to an action upon the bond at common law, and though he admitted that it was not within the statute of *Edward VI.*, yet he treated it as bad, upon grounds of public policy, and instanced the case of marriage brokage bonds. There, it was not pretended, that the person recommended was unfit to fill the office. In the case of a banker retiring, he is still liable for any pecuniary loss, and therefore there is no fraud: but here the confidence is placed upon the attorney for that skill which he does not exercise. He was proceeding to argue that *recommendation* itself had never been considered as

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* *Bro. Chan.* 124. † 1 *H. Black.* 327.

a consideration, and was putting the case of a person recommended to service from a *register-office*, when the court interposed.

LAWRENCE, J. "How does the question, of the want of consideration arise, when the contract is by deed?"

LE BLANC, J. "It is open to you to raise the question, upon a bad consideration, but not to say that there is no consideration."

Lord ELLENBOROUGH, C. J. "Here is not only the consideration of recommending the parties to business, but also that of relinquishing himself the benefits to which they are to be recommended. Here is a bond for the payment of the money, and unless the consideration is bad by statute, the bond is good if any part of the consideration be good."*

Cur. adv. vult.

And afterwards, in Michaelmas term, the Court returned the following certificate to the Lord Chancellor.

This case has been argued before us by counsel. We have considered it, and are of opinion, that the contract or agreement of the 6th of December, 1797, stated in the case, is good in law, so that the said *C. Carpenter* could recover the money therein mentioned, in an action against the said *J. Bunn* and *J. Guy*. Nov. 7, 1803.

ELLENBOROUGH.
N. GROSE.
S. LAWRENCE.
S. LE BLANC.

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* *Willes's* Rep. 574; *Lee* v. *Coleshill*; *Cro. Eliz.* 529; *Norton* v. *Syms*. A distinction is there taken between covenants, or conditions, void by the common law, and those which are void by statute. It is said, when some covenants in an indenture are void by the common law, and the others good, a bond for the performance of all the covenants may be good, as far as respects the covenants that are good; but otherwise, if any of the covenants be void by the statute, there the bond is void *in toto*. See also 1 *Mod.* 35, 36; *Roe* v. *Galliers*, per *Buller*, J.; 2 Term Rep. 129.

1803.

GRANT *versus* FAGAN.—*Same day.*

Practice. Bail.

TIME refused to be enlarged, for the bail to surrender the principal, where he is detained in a foreign country by order of the government there.

GRANT *versus* FAGAN.

JEKYLL moved, on behalf of bail, that they might be allowed further time to surrender the defendant, or that an *exoneratur* might be entered upon the bail-piece, on the ground that the defendant went to France during the last *peace*, that he was preparing to return home and surrender in discharge of his bail, when he was detained as a prisoner of war by the French government, and thereby the bail were prevented from complying with the conditions of the bail-bond.

He endeavoured to shew a resemblance between this case and the cases of bail being exonerated, upon the *surrendering* of the principal becoming impossible, by the defendant being made a peer, or being ordered to be sent out of the kingdom under the acts of parliament relating to aliens.

BUT BY THE COURT. Those were cases arising upon acts done by our own government; but this is entirely owing to an act of a foreign government. The defendant has had the benefit of his enlargement ever since the first arrest, and the bail might have kept him from going out of the kingdom. Indulgence is never given to bail, even in case of the sickness of the defendant, which is at least equally hard upon both the defendant and the bail. There was a case formerly moved by Mr. Mingay, where the defendant lay sick at Chelsea, and had fallen ill on the very day of making the motion, yet the court would not interfere.

PARK, *amicus curiæ*, mentioned also the case of *Wynn* v. *Petty*,* in last term, and the Master also referred to some others. RULE NISI REFUSED.

* 4 *East's* Rep. 102.

NUNN *versus* POWELL.—*November* 28. 1803.

WHERE money is deposited with the sheriff in lieu of bail, under the statute 43 Geo. III. c. 46. s. 2., *the court will, upon bail being put in and perfected, order it to be repaid to the bail, or any other person by whom it was actually deposited, instead of the defendant.*

Money paid out to bail.

A RULE was obtained on the behalf of one *Tompkins* calling upon the sheriff of the county of Lancaster, to shew cause why the sums of 177l. and 15l., deposited in his hands, under the statute 43 *Geo. III.* c. 46. s. 2, *in lieu of bail*, for the appearance of the defendant, should not be paid over to him, the defendant having put in and perfected special bail, and having surrendered in discharge of his bail.

NUNN *versus* POWELL.

By the affidavits, it appeared that it was the money of *Tompkins* which had been deposited for the above purpose. But it also appeared, from the affidavit of *Powell*, that he was arrested as drawer of a bill of exchange on, and accepted by *Tompkins* and one *Schrader*, his partner, for goods purchased by *Powell* for their use, and delivered to them. He therefore insisted upon an equitable claim to this money.

Tompkins, the plaintiff, and the defendant appeared each by their respective counsel, ERSKINE, GARROW, and ANDREWS, to support their claims. And it was urged, on behalf of the defendant, that, by the words of the act, "upon perfecting bail, the money so deposited shall, by order of the court, upon motion made, be repaid to such *defendant*;" and therefore the court could look only to him as the party interested in it.

BUT BY THE COURT. The act means, that it should, *bonâ fide*, be repaid to the person who has actually deposited it; to him whose property it really is. As to the other claims upon the money, we cannot enter into them upon the present application.

RULE ABSOLUTE.

1803.

SHAW *and Another (assignees of* HILL, *a bankrupt,) versus* JAKEMAN.—*Nov.* 19.

Bankrupt. Settlement. Agreement.

AN agreement made before marriage, and a deed of settlement pursuant thereto after marriage, will bind the creditors in case of the bankruptcy of the husband; but there being a mistake in the articles and settlement in this case, which were altered by the consent of all parties, and re-executed without a new stamp, after the bankruptcy, held, that the alteration being not even in pursuance of a parol agreement before marriage, did not bind the creditors; and yet that, notwithstanding the alteration and re-execution, the deed and articles were good, as to their original stipulations; for they could not be avoided, without the consent of the feme, *who, by reason of her coverture, could give no consent.*

SHAW versus JACKMAN.

THIS was an action of assumpsit for money had and received to the use of the bankrupt Hill, and also for other money had and received to the use of the assignees. At the trial before Lord ELLENBOROUGH, C. J. in the sittings after last Easter term, it appeared in evidence, that the bankrupt *Hill* had married the daughter of the defendant. And previous to the marriage, (3d August 1802,) an agreement in writing was entered into between the bankrupt and the defendant, whereby, after reciting the marriage which was intended to be had, it was agreed, that the sum of 340l. 3 *per cents.*, belonging to Hill, should be transfered to trustees, and settled on the wife and the children of the marriage. The marriage afterwards took place on the 23d of August. A deed of settlement was drawn according to the terms of the agreement, in which the defendant, and another person, who had married Hill's sister, were made the trustees, and it was executed on the 29th of November following. *Hill* absented himself from his house from some day early in September until the 14th of December, and thereby committed an act of bankruptcy. After the execution of the deed, it was found that there had been a mistake committed by the attorney in the amount of the stock to be

transferred. It was the intention of the parties, that the whole of *Hill*'s stock in the 3 *per cent. consols*, should be settled on his wife as above; but when he gave instruction for the deed, he represented it as only 340l., meaning that it was worth that sum in sterling money, whereas in fact his actual stock was considerably more, viz. 450l. 3 *per cents*. In order to rectify this mistake, an alteration was made both in the articles and the deed, and they were re-executed, about five or six days after the original execution of the marriage-settlement. This alteration was with the privity and consent of all parties. The act of bankruptcy was found by the jury to be committed on the 29th-day of November 1803, and a verdict was taken for the plaintiffs in the amount of the value of the whole of the 450l. stock, subject to the opinion of the court upon the following questions: 1st, Whether, as the deed was altered in an essential point as to the money secured thereby, it did not require a new stamp to render it a valid instrument: and, 2dly, Whether, by the alteration, it was not wholly void, even as to the sum of money *originally* conveyed to the trustees under it.

For the purpose of deciding these points, a rule was obtained in Trinity term, calling upon the plaintiffs to show cause why there should not be a new trial.

GIBBS and MARRYAT *for the plaintiffs*. "This being an agreement before marriage, and a deed in consequence thereof, executed after the marriage, it was contended for the plaintiff at the trial, that the alteration being made with the consent of all parties, the deed was good, even for the 450l. stock. But, at the time when it was altered, every thing which *Hill* the bankrupt had was vested in his assignees, whose consent, then, became necessary, and without it there could be no interest conveyed to the trustees in this sum of 450l. stock. And in *Master* v. *Miller*,* it was held, that an alteration in a note, by accelerating the day of payment, rendered it

* 4 Term Rep. 320.

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void *ab initio*. For, if it were not so, a man who intended by such an alteration to commit a fraud, or what the law, though it be not done *malâ fide*, calls a fraud, would run the chance of gaining by it, without any risk in case of its being detected. But if this could be done without the consent of the assignees, there should have been a new stamp upon the re-execution of the deed, otherwise it could not be given in evidence; for it is a perfectly new deed, since the first agreement was made to operate upon only 340*l*. *three per cent. consols.*, but this is made to operate on 450*l*. And, for the like reason, as there is no evidence in writing made previously to the marriage for more than 340*l*., this deed cannot be valid for more than that sum. For by the *statute of frauds*,* 'no action shall be brought whereby to charge any executor, &c. or to charge any person upon any agreement made in consideration of marriage, &c. unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.' Here 'the parties to be charged' were the assignees, who have signed no agreement, and the plaintiffs are therefore intitled to retain the verdict, either for the whole sum, or for the difference between the worth of the 450*l*. stock, and the 340*l*. stock."

ERSKINE and GARROW, for the defendants. "This is not an action upon the agreement, nor upon the deed; but in *assumpsit*, which is an *equitable* action, and the assignees of the bankrupt can only take his estate, subject to all the equities to which he is liable; and if *Hill* could not recover, neither can the plaintiff, as his assignee. This was a *bonâ fide* agreement entered into with the father, who refused to let *Hill* marry his daughter unless he would settle the whole of his money in the funds upon his intended wife and her issue. And this agreement

* 29 *Car. II.* c. 3. s. 4.

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being made before the bankruptcy and not in contemplation of bankruptcy, will bind the assignees. It was indeed argued, that the conveying nearly all the bankrupt was worth, in settlement upon his wife, was of itself an act of bankruptcy; but the finding of the jury, that it was not in contemplation of bankruptcy, is a sufficient answer to that argument. The alteration in the deed was, to make it according to the truth; and there was no attempt to defraud any of the parties. On the contrary, they all consented. But in *Master* v. *Miller*,* there was an intention to *defraud*, and, therefore, this is clearly distinguishable from that case. The actual agreement, prior to the marriage, was for the whole of the stock to be transferred, and not a specific sum; and whether a mistake was made by *Hill*, or the attorney, a court of equity would have compelled a specific performance of this agreement, if *Hill* had continued solvent."

THE COURT doubted as to the power of the wife to consent to the altering or annulling of the deed and agreement; and took time to consider how far she, or her trustee, could be affected by what had been done.

On the next day, Lord ELLENBOROUGH, C. J. delivered the opinion of the court to the following effect: "The question, in this case, is, Whether the plaintiff, who is the assignee of *Hill*, a bankrupt, shall be permitted to recover from the defendant the value of the stock in his name, which he has received of him, and holds as trustee for the benefit of the wife of the bankrupt? Upon the evidence it appears, that *Hill* received the produce of the stock, and delivered it to *Jakeman*, upon the trusts stipulated. Those trusts were evidenced by articles of agreement entered into before marriage; but it is said, that these articles were destroyed by the consent of all the persons for whose benefit they were made, and new articles were entered into, after marriage, which were void

* 4 *Term Rep.* 320.

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for want of a stamp, and the whole fails. This could not be; because, at the time, one of the parties chiefly interested, namely, the wife, was incapacitated, by her coverture, from giving her consent to the annulling of any agreement made for her benefit; so that the instrument, if destroyed without her consent, and, as we have seen, no such consent could have been given by her) would be set up in equity. For, at the time when the marriage articles were executed, there was a good agreement subsisting, even under the statute of frauds, evidenced by writing, and made in consideration of marriage, which would be binding against the creditors; for the assignees of the bankrupt would only have the same interest in the stock which the bankrupt himself had. In the case of *Tyrrel* v. *Hope*,* the master of the rolls held, "that a note, under the hand of the husband, ought to be looked upon as part of the marriage agreement, and, consequently, a part of the settlement; and, as the wife would have been relieved, if she had brought a bill against the husband, equally so as brought against the assignee, who stands in his place." "The assignees," he says, "can be considered no otherwise than as the bankrupt himself, because what has been done upon the marriage is in the nature of a trust only for the wife, and, therefore, if the husband is only a trustee for the wife, the assignees, of course, must be trustees, in the same manner as the husband was." Perhaps even a parol agreement, made before marriage, and fulfilled by the marriage, would be a charge against the husband and his creditors: for she is induced to marry him by means of the agreement; and the marriage is a part performance of it, which probably would take it out of the statute of frauds. *Dundas* v. *Dutens*.†

* 2 *Atkyns*, 558.

† *Dundas* v. *Dutens*, 1 *Vesey, jun.* 196. In that case a settlement was made subsequent to the marriage by indenture, *reciting a parol agreement before the marriage*, to settle the property of the wife, 1000l. three per cent. consols., and other stock and monies, and accordingly settling it on the wife and children;

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But the trustee *Jakeman* cannot be intitled to more than the 340l. stock, which was agreed to be settled on the wife, by the articles before marriage. For, although it is said, that the deed executed by the bankrupt on the 29th of *November*, was made in order to correct a mistake in the former articles, by settling the 450l. stock, originally intended to have been settled on the wife, instead of the

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as to 100l. per annum to the wife for her separate use for life, and the surplus proceeds to the husband for life, then to the wife for life, and afterwards to the children. In the argument, the counsel for the children cited *Cro Jac.* 454, *Dame Griffin* v. *Stankope*, where a settlement after marriage, founded upon a promise of the husband before marriage, upon which reposing confidence, she married him, was held to be not fraudulent, even as against creditors: and also 1 *Ventr.* 194, *Sir Ralph Bovey's* case, and 2 *Levinz*, 146, where, though the settlement was determined to be fraudulent, yet, by the fourth resolution, it would have been different, if there had been an agreement or *promise* before marriage. *Lord Chancellor* THURLOW. "If the husband made an agreement that he would settle, and then, in fraud of that agreement, got married, would not he be bound by it?*, I thought there was a case in point for that. What the settlement might be, if made upon himself after marriage, is another question. But in *Eq. Cas. Ab.* where there was an agreement before marriage, and the father drew the man in, and was privy to his having married without any *execution* (of the instruments), and then refused, relief was given. If in this case there was an agreement before marriage, and afterwards he drew her in to be married; and then refused to perform it, it appears to me to be that kind of fraud which this court will relieve. If there is a parol agreement for a settlement upon marriage, after marriage, a *suit*, upon the ground of part performance, would not do, because the statute is expressed in that manner. But is there any case, where in the settlement the parties recite an agreement before marriage, in which it has been considered within the statute?"

* In case of fraud, equity would relieve. *Lady Montacute* v. *Maxwell*, 1 P. *Will.* 620; but not where no fraud: but the party only relied on promises, honour, &c. *ibid.*

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SHAW *versus* JARAMAN.

340l. stock, which was a mistake for 340l. principal money, yet there is no evidence, even *by parol*, of any agreement, to settle that sum, made before marriage; and therefore the court are not now sufficiently authorized to give effect to such a purpose. If the wife of the bankrupt has any right to set up that deed, upon the ground of a mistake in the articles, her remedy must be in equity. At present, we think that in this action of *assumpsit* the defendant, the trustee, is only intitled to retain to the extent of the 340l. stock; and the verdict must therefore be reduced to the amount of the difference between that sum and the 400l. stock."

VERDICT FOR THE PLAINTIFF ACCORDINGLY.

COXE *and Others v.* HARDEN.—*Nov.* 11.

Trover. Bill of lading. Stoppage in transitu.

A. purchases and ships goods for B., *and sends a bill of lading, unindorsed, to him. The goods are received by* B., *who sends the bill of lading to* C., *to satisfy a debt; he gets possession of them;* B. *then becoming bankrupt,* A. *sends the bills of lading indorsed to his correspondent, to secure the amount of the bill drawn on* B. *on account of the goods: Held, that* B. *has only the right of stopping in* transitu, *and the indorsee of the bills of lading cannot maintain* trover *for the goods. Bills of lading pass the property in goods, only when for a valuable consideration, and without notice of a prior claim, and are not* analogous *in all respects to bills of exchange. An agent who purchases goods for another has the same right of stopping in* transitu *as the original seller.*

COXE *versus* HARDEN.

THIS was an action of trover, to recover the value of *eighteen* mats of flax; the defendants pleaded the general issue, *not guilty*; and at the trial of the cause before the right honourable Lord ELLENBOROUGH, at the sittings at Guildhall, after last Easter term, a verdict was found for the plaintiffs for 266l. 7s. subject to the opinion of the court upon the following case:

In the month of February, 1802, the flax in question

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was, by order of Messrs. *Oddy* and *Co.* of London, purchased by Messrs. *Browne* and *Co.* of Rotterdam, and shipped by them from thence for the said Messrs. *Oddy* and *Co.* on board the ship *Vrow Jannetje*, being a general ship for the port of *London*. On the 12th day of February, 1802, *Browne* and *Co.* wrote and sent the following letter to *Oddy* and *Co.* inclosing an invoice and a bill of lading to the order of *Browne* and *Co.*, the shipper, but which was not indorsed.

"Having none of your esteemed favours, we have the pleasure of sending you bill of lading, and invoice of the remainder of the flax we purchased for your account, by order of Mr. *Oddy*, consisting of eighteen mats, which are shipped by *the Vrow Jannetje, Jacob Purlevet*, master, for your place, the amount being *fl.* 3376 10 at exch. ℔ 317l. 0s. 10d. We have this day drawn on you at two usances, in favour of *S. E. Laton, Fisher*, and *Co.*, no doubting will meet due honour. We close this account in course."

For the amount of the said eighteen mats of flax, Messrs. *Browne* and *Co.* drew a bill upon *Oddy* and *Co.* which, owing to embarrassment in their circumstances, they did not accept. Messrs. *Oddy* and *Co.* became bankrupts on the 23d of *February*, 1802, and a few days before, delivered the aforesaid bill of lading, without indorsement, to the *defendants*, on account of a debt antecedently due to them from *Oddy* and *Co.*

The said ship and flax, on the 29th of *February*, 1802, were sold by the brokers of the *defendants*; and the following *account-sales* thereof was rendered by the defendants to Messrs. *Oddy* and *Co.*

Account sales of eighteen mats of flax, sold for account of Messrs. *Harden* and *Craik*, London, 6th April, 1802, per Wm. *Purdy* and *Son*.

	£.	s.	d.
To Walker and Sons, 70 cwt. 1 qr. 27lb. nett at 82s.	289	0	3
Discount 2½ per cent,	7	4	6
	281	15	9

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		£.	s.	d.	£.	s.	d.
	Brought forward				231	15	9
	CHARGES.						
Cartage 22s. 6d. housing 9s.		1	11	6			
Weighing 9s. rent 15s. 9d.		1	4	9			
Brokerage 1l. per cent. -		2	17	10			
Freight - -		7	9	0			
Lighterage 19s. cartage 12s. 2d. and entry 14s. 6d. -		2	5	8			
					15	8	9
Nett proceeds carried for the present to the credit of Messrs. Oddy and Co. though now under litigation, - -					266	7	0

The captain of the ship *Vrow Janneije*, signed three bills of lading for the said flax, all to the order of *Browne* and *Co.* the shippers, who transmitted one of the bills of lading to the *plaintiffs*, with an indorsement upon it, making the contents deliverable to them, for *the purpose of securing the amount of their said bill upon Oddy and Co.* The *plaintiffs* on the 6th of *March*, whilst the flax remained in the warehouses, and unsold, and also before the commencement of this action, demanded it, under the last-mentioned indorsed bill of lading from the defendants, and forbade the sale of it; but the defendants, refused to deliver, and afterwards sold it. No tender of money, in respect of the freight or other charges paid by the *defendants* was made to them.

The question for the opinion of the court is, Whether, under the circumstances above stated, the plaintiffs are intitled to recover or not? If the court shall be of opinion that they are, the verdict is to stand; if not, a nonsuit to be entered.

GILES *for the plaintiffs.* "The *plaintiffs* claim, under a bill of lading *indorsed* to them by *Browne* and *Co.*, the original owners and consignors of the goods, and, therefore, must now stand in their place. The *defendants*, on the contrary, have got the *possession* of the goods

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wrongfully; and whether their *original possession* was lawful or not, yet the subsequent sale of the goods is an absolute conversion. This renders that part of the case, in which it is stated that no tender was made of the freight, perfectly immaterial. The property in these goods could only pass from out of the consignors by means of a bill of lading, regularly indorsed by them. For a bill of lading does not pass the property in goods by the mere delivery of it, as a bill or draught, payable to *bearer*, passes the right to the contents; but must be indorsed; and therefore the *captain*, by whom the goods were sent, might have made a good defence to an action of trover, brought against him by any person claiming, as *Oddy* and *Co.* did, under *a bill of lading unindorsed*. The defendants, therefore, who received the goods from *Oddy* and *Co.*, a few days before their bankruptcy, although for a debt antecedently due, have no title to the goods, since they claim from *Oddy* and *Co.*, who had none. And besides the account of sales, which states, "*the nett proceeds* to be *carried for the present to the credit of Oddy and Co., though now under litigation*," plainly shews that the defendants took them for the purpose of selling them on *their* account, and not by way of a fair sale, or absolute conveyance of the property to themselves."

[LAWRENCE, J. "The *account of sales* proves nothing; for it only states, that the nett proceeds are carried for the *present* to the *credit of Oddy and Co., because* they are now under litigation."

LE BLANC, J. "Suppose they were now in the hands of *Oddy* and *Co.*?"]

"Then *they* could have no property in the goods; for the bill of lading was only sent to them, *upon the condition* of their accepting the *bills of exchange*; and they have not done so."

MARRYAT, *for the defendants*. "The party bringing an action of *trover* must have some title to the goods

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either *general* or *special*; but the *plaintiffs* here have no title whatever. A title has been assumed, but it is not proved. What is stated in the case is sufficient only to give them a mere *authority* to demand the goods for *Browne* and *Co*; much like the authority given to an attorney's clerk, when he is sent to demand payment of a debt. For, here, it is not stated that *Browne* and *Co.* have indorsed the bills, even for a valuable consideration, but, merely, *for the purpose of securing to themselves the payment of the bills of exchange*; but this no more conveys the property in the goods, than an authority to demand them in right of another, conveys a right to bring an action for them in the name of the party to whom that limited authority of mere *demand* is given. The custom of merchants, as to the indorsement of bills of lading, is, that it must be before the voyage is completely performed; and it is done merely to enable the party to whom the goods are consigned to sell them, before they may have arrived. The mere indorsement does not convey an absolute property in the goods; and certainly it is not the only mode of conveying property in them. If it were so, the inconvenience would be great: for by the revenue laws the duties on several articles are to be paid within twenty-one days, or some other specified time; and it might, therefore, often happen, that, for want of the bill of lading, the party really intitled to the goods could not get possession of them in due time. In this case *Browne* and *Co.* had purchased *for Oddy* and *Co.* they were the actual owners; they had an immediate right to the goods, without a bill of lading indorsed to them; except that *Browne* and *Co.* had the same right of stoppage *in transitu*, as the original sellers to them would have had. *Oddy* and *Co.*, therefore, were at the risk of the voyage; and then had the property in the goods, liable only to be *divested* out of them by the *act* of the shipper, during the course of the voyage. As to the letter giving them only a *conditional* right to the goods, in case the bills of exchange were accepted, it contains

no such terms or conditions. And as to the argument drawn from the mode of crediting for the nett proceeds, they were delivered over for a previous debt of *Oddy* and *Co.* But if they had been delivered to them merely as the agents of *Oddy* and *Co.*, they would nevertheless have a right to the goods, there never having been a *recaption* or stoppage *in transitu* by the shippers during the voyage."

GILES, *in reply*. "The argument for the *defendant* proceeds upon the ground, that the *plaintiffs* are merely agents of *Browne* and *Co.* making a demand for them after they have transferred the property in the goods to the *defendants*; but, in fact, they have now no property, for it has passed to the *plaintiffs* by the bill of lading. That is not a mere authority to receive; it goes further—it conveys an absolute property in the goods. The admission that *Browne* and *Co.* might have stopped the goods *in transitu*, is sufficient to negative their being the mere agents of *Oddy* and *Co.*; for, if they were mere agents, and the goods stood at the risk of *Oddy* and *Co.*, they never could have stopped the goods *in transitu*."

[LAWRENCE, J. "Do you mean to say, that if a party ship goods at the risk of another, yet he has no right to stop them *in transitu*?"]

"The right of stopping *in transitu* implies an antecedent right of possession; and these persons are not the consignees, and cannot claim the goods, without the indorsement of the bill of lading by the shipper."

[LAWRENCE, J. "Supposing the ship had been lost, who must have stood to that loss?"]

'*Browne* and *Co.*—for not having indorsed the bills of lading, they were the only persons who could have sued the captain for the goods. *Oddy* and *Co.* must have sued the captain in the name of *Browne* and *Co.* for there was nothing by which the property could be transferred to them. All the cases, as to stopping *in*

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transitu, or making a claim, are when a title goes with the possession, and the bill of lading is indorsed."

Lord ELLENBOROUGH, C. J. " If it were necessary to decide the question, Whether or not the *plaintiff* have such a property in the goods now in litigation as to enable them to maintain an action of *trover*, I am prepared now to say, that they could not maintain such an action. For they claim under a bill of lading indorsed to them by the consignors of the goods, *Browne* and *Co.*; but there is no case which has yet gone the length of determining any thing further than this, namely, that an assignment of a bill of lading, by indorsement, for a valuable consideration, without notice of a prior right, passes the property in the goods to the indorsee. In this case, it does not appear that any valuable consideration actually passed between the plaintiffs and Messrs *Browne* and *Co.*; nor does it appear, when the indorsement of the bill of lading was made. An analogy has been attempted to be raised, in the course of the argument, between a bill of lading and a bill of exchange; but it has been carried much too far. Some resemblance there may be between them; but a strict analogy I cannot admit to exist. Upon this subject I accede entirely to the authority of *Lickbarrow* v. *Mason*,* as decided in this court. From the statement of this case, I can only consider the *plaintiffs* as the agents of Messrs *Browne* and *Co.*, empowered by the bill of lading to act for them; and even *Browne* and *Co.* themselves were, as to the purchase of these goods, agents for Messrs. *Oddy* and *Co.* Supposing however, that the plaintiffs have any other rights than those of mere agents, how do those rights stand? The goods are shipped by the consignors for *Oddy* and *Co.*; and had they stood at the side of the ship when the lading was put on board, *Browne* and *Co.* would have been divested of all right in them. For it was for *Oddy* and *Co.* that they were purchased, and at their risk that they

* 2 Term Rep. 63. 5 Term Rep. 367 and 683. 6 Term Rep. 131.

were shipped; and they must have stood to the loss of them during the voyage. The captain indeed could not have been compelled to have delivered the goods to *Oddy* and *Co.*, without the production of a bill of lading properly indorsed; but the goods having been received under a bill of lading, fairly transmitted to them by the consignor, the property in the goods is become completely vested in them. Whether the captain can be made liable to Messrs. *Browne* and *Co.* for delivering the goods without the authority of a bill of lading properly indorsed, is another question, entirely between them and the captain; and however it may be decided, will not affect this case. Here is, in fact, a delivery made to the very persons to whom the consignors transferred the goods; the persons at whose risk they were shipped, and at whose risk they continued during the voyage. And the consignors, after delivering them to the captain, had no further right in them, than that of stopping them during the progress, and before they were landed, in case the consignors became insolvent, or did not fulfil the engagement into which they had entered in respect of them. But there could be no such stoppage; for the goods arrived and came to the appointed hands, to whom, as between the vendor and vendee, they were destined. As to the inference which has been attempted to be drawn from the entry, in the account of sales, of the "nett proceeds carried to the account of Messrs. *Oddy* and *Co.*," that the *defendants* consider themselves as only the agents of *Oddy* and *Co.*, and acting as brokers for them; that inference really cannot be raised. The entry is in terms expressed, that they are carried to their credit only provisionally, because it is a matter in litigation, and because they consider, that if they are divested of the property in the goods, *Oddy* and *Co.* must be accountable to them for the amount of the value and nett proceeds of them. We are therefore of opinion, that the plaintiffs are not intitled to maintain this action of *trover*, because, at the most they cannot have a better title than Messrs. *Browne* and *Co.*; and they, at the time of the indorsement of the bill of

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lading to the *plaintiffs*, had only a right to stop the goods *in transitu*; but *Oddy* and *Co.* having received those goods under their authority, even that right was gone, and the plaintiffs can have no title."

GROSE, J. "In order to entitle the plaintiffs to recover in an action of *trover*, there must not only be a property in the goods vested in the *plaintiffs*, but there must have been a wrongful conversion of them by the *defendants*. As to the property in the *plaintiffs*, what is it, and how has it been derived to them? There was at the time of shipping the goods by *Browne* and *Co.* a delivery of them in point of law to Messrs. *Oddy* and *Co.*, but the property conveyed by that delivery was still liable to be divested out of them by seizure *in transitu*. Has this seizure been made, and has the property been so divested? The property that has been supposed to be conveyed to the *plaintiffs* could have passed only by the bill of lading indorsed to them. But the bill of lading might have been indorsed, for any thing that appears, after the goods had arrived at the hands of the consignees; besides, it should have been upon a valuable consideration; and it does not appear to have been made for a valuable or any consideration. It therefore does not appear, that the property has been divested out of the consignees, Messrs. *Oddy* and *Co.*, by any thing which has been done. And the property was *vested* in them, from the first shipping of the goods, for their own account. They might have insured the goods during the voyage, and have recovered of the underwriters, in case they had been lost; and if not lost, they would have been liable either to the merchants of whom they were purchased, or to Messrs. *Browne* and *Co.* for the price of them. The *plaintiffs*, therefore, are not entitled to recover in this action."

LAWRENCE, J. "It is not necessary to decide in this case how far a bill of lading indorsed to any person conveys a property in the goods, or whether, according to the custom of merchants, it can be effectually indorsed

after the goods arrive at the warehouse. Certainly, however, the analogy, that has been pressed so much between bills of exchange and bills of lading has been carried too far. The indorsement of the bill of lading has not the effect of transferring the property in the goods; it is only an authority to take from the captain those goods when they arrive at the port of destination. And, in this case, it is only necessary to consider what was the actual purpose, as it appears from the statement of the case, for which the bill of lading was indorsed. It was indorsed to the *plaintiffs* for the purpose of securing the amount of *Browne* and *Co.*'s bill of exchange upon *Oddy* and *Co.* It was indorsed to the *plaintiffs* as the agents of *Browne* and *Co.*, with a view to their executing the right which they had of stopping the goods in *transitu*, and compelling the performance of the engagements of *Oddy* and *Co.* to pay for the goods. The captain, therefore, might very well have delivered the goods to the *plaintiffs* under this authority, as the agents of *Browne* and *Co.*, for the *plaintiffs* meant only to act as their agents. Yet supposing they did intend to act otherwise than as mere agents, they cannot now recover, for the goods were put on ship board, without any restrictions, at the risk and for the use of *Oddy* and *Co.*, subject still to a stoppage *in transitu*, by *Browne* and *Co.*, or their agents. But, during the passage, they did not attempt to stop their goods. They suffered them to arrive, and *afterwards* tried to get possession of them by demanding them of the *defendants*. Now, though they might have got possession of them from the captain, or at any time before the delivery either to Messrs. *Oddy* and *Co.*, or to the *defendants* deriving title under them, yet they can have no title to the goods after they have arrived into their possession, and therefore cannot maintain this action."

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LE BLANC, J. "The difficulty of this case has arisen from taking into consideration the liability of the captain, and what he ought to have done with respect to his shippers; whether he ought to have delivered the goods

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to any one but the person who produced the bill of lading properly indorsed, which is entirely beside the present case. As it stands now, the question in this case is merely between *Browne* and *Co.* or, supposing the *plaintiffs* have derived a good title from them, between the *plaintiffs* and the *defendants*, on account of whom the goods were purchased, and at whose risk they were shipped. For it appears, by the letter of *Browne* and *Co.*, that they were so purchased and shipped for *Oddy* and *Co.*, and that bills were drawn upon them for the value. Therefore, without any bill of lading, and whether indorsed or not, they were liable to the loss, if any happened, during the voyage. The right of the consignors, whether they were the real owners of the goods, or mere brokers acting for *Oddy* and *Co.*, was only to stop the goods *in transitu*. And whenever the goods get into the actual possession of *Oddy* and *Co.* or their assignees, that right is determined. Whether they get into their possession wrongfully or not, as far as respects the captain is not material; there is still no right in *Browne* and *Co.*, or their agents, or persons deriving title under them, to obtain possession of the goods after the *transitus* is ended, by the complete arrival of the goods. Nothing rests upon the memorandum in the *account of sales*, though it has been pressed a good deal. That is clearly only provisional. The *defendants* had a claim made upon the goods, and until that claim was settled, they could only carry them to the credit of *Oddy* and *Co.*, liable to that claim, if it should be made good. The ground of my opinion is, that the goods were originally shipped for *Oddy* and *Co.*, and that having got them into their hands, neither *Browne* and *Co.*, nor any persons claiming under them, have any right to them."

POSTEA TO THE DEFENDANTS.

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REX *versus* NOTTINGHAM.

THE KING *versus* JOSEPH NOTTINGHAM.

Thursday, Nov. 10.

Indictment. Certiorari. Recognisance. Statute 38 Geo. 3. c. 52, s. 12.

WHERE an indictment has been originally preferred and found at a sessions for a city, and removed into the court of King's Bench by writ of certiorari, *and then sent down to be tried by a jury of the county at large, it is not necessary that the party removing it should enter into a recognizance in the sum of* 40*l. under the statute* 38 *Geo. III. c.* 52. *s.* 12.

THIS was an indictment against the *defendant* for an assault, originally preferred and found at the sessions for the city and county of the city of *Lincoln*, which was afterwards removed by *certiorari* into this court, and tried in the city of *Lincoln*, at the assizes for the county; and the *defendant* was found guilty.

READER now moved for a rule, to shew cause, why the conviction should not be quashed, upon the ground, that by the 38th *Geo. III.* c. 52, s. 12, it was required that, before the trial could be had in the adjoining county to where the offence was committed, the party should enter into a recognizance "in the sum of 40*l.*, conditioned to pay the extra costs attending the prosecution for such offence in the next adjoining county." And in this case no such recognizance had been entered into.

LAWRENCE, J. "That clause does not seem to apply to the present case of a removal by *certiorari*, but only to cases of offences committed within the jurisdiction of courts of a *limited* jurisdiction, where the indictment is immediately preferred before the jury of the county next adjoining, under the particular provisions of that act. He then read the 2d and 3d clauses of the act, and said that there was nothing in them which applied to the present case of a removal by *certiorari* into the court of King's Bench, in order to send the indictments down to b tried at the assizes."

READER then submitted, that the 12th clause of the act applied to the whole of the former clauses; that in-

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the first clause the case of a removal by *certiorari* is mentioned, and that in the proviso, in the 12th, there is a reference also to that case, the words being, that "nothing in the act should extend, to enable any person to prefer any bill, or to *remove* any indictment, &c. except the person preferring such indictment, or *applying for such removal*, shall enter into a recognizance," &c.

BUT BY THE COURT. That only relates to removals from courts of *oyer* and *terminer*, as mentioned in the act. Otherwise it would considerably abridge this court of its authority to remove by *certiorari*.*

RULE NISI REFUSED.

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* "This statute enacts, that from and after the passing of "the act, in every action, whether the same be transitory or "local, which shall be prosecuted or defended in any of his "majesty's courts of record at *Westminster*; and in every in- "dictment removed into his majesty's court of *King's Bench* by "writ of *certiorari*, and in every information filed by his majesty's "*Attorney* or *Solicitor General*, or by the leave of the court of "*King's Bench*, and in all cases where any person or persons shall "plead to or traverse any of the facts contained in the return to "any writ of mandamus, if the venue in such action, indictment, "or information, be laid in the county of any city or town cor- "porate within that part of Great Britain called England, or of "such a writ of mandamus be directed to any person or persons, "body politic or corporate, it shall and may be awful for "the court in which such action, indictment, information, or "other proceeding shall be depending, at the prayer and in- "stance of any prosecutor or *plaintiff*, or of any *defendant*, to "direct the issue or issues joined in such action, indictment, "information, or proceeding, to be tried by a jury of the county "next adjoining to the county of such city or town corporate "and to award proper writs of *venue* and *distringas* accordingly, "if the said court shall think it fit and proper so to do.

2. "That it shall and may be lawful for any prosecutor or "prosecutors to prefer his, her, or their bill or bills of indict- "ment for any offence and offences committed, or charged to be "committed, within the county of any city or town corporate, to

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TAPPENDEN *and Others* (*Assignees* of BLINKHORN *and Another*) *versus* BURGESS.—*Saturday, November* 12.

Bankruptcy. Assignment of effects to creditors.

THOSE who are parties and privies to an assignment of all a trader's effects, cannot sue out a commission upon it as an act of bankruptcy; but a commission being sued out by a person not privy to the assignment, THEY *may be chosen assignees. A trader agreed to execute an assignment of all his effects to trustees for the benefit of creditors, which was accordingly prepared and executed by him, and a great part of the creditors: the bankrupt executed the deed with an intention of carrying it into effect: but the creditors had previously concerted amongst themselves, that it should be used only for the pur-*

" the jury of the county next adjoining to the county of such " city or town corporate, sworn and charged to inquire for the " king for the body of such adjoining county at any sessions of " *oyer* and *terminer*, or general gaol delivery; and that every " such bill of indictment, found to be a true bill by such jury, " shall be valid and effectual in law, as if the same had been " found to be a true bill by any jury sworn and charged to inquire " for the body of the county of such city or town corporate.

3. " That if it shall appear to any court of *oyer* and *terminer*, " or general gaol delivery for the county of any city or town cor- " porate, that any indictment found by any grand jury of the " county of such city or town corporate, or any inquisition taken " before the coroner or coroners of the county of such city or " town corporate, or other franchise, is fit and proper to be tried " by the jury of any next adjoining county; that it shall and " may be lawful for the said court of *oyer* and *terminer*, or gene- " ral gaol delivery, at the prayer of any defendant, to order such " indictment or inquisition, and the several recognizances, exa- " minations, and depositions relative to such indictments and " inquisitions, to be filed with the proper officer, to be by him " kept among the records of the courts of *oyer* and *terminer* and " gaol delivery for such next adjoining county, and to cause the " defendant or defendants in such indictment to be removed by " *habeas corpus* to the gaol of such next adjoining county, which

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pose of making him a bankrupt, and did not communicate that intention to him; another creditor, who had never assented to the deed, sued out a commission. Held, that this was an act of bankruptcy in the trader; the purpose of a fraudulent conveyance being effected by him as far as it was in his power to do it.

TAPPENDEN *& al.* *versus* BURGESS.

THIS was an action by the plaintiffs, as the assignees of the bankrupts, for money had and received to the use of the bankrupts. It was tried before Lord ELLENBOROUGH, C. J. at the sittings after last Trinity term, and a verdict was taken for the plaintiffs for 780l., with leave for the defendants to move to set it aside and enter a nonsuit, in case the court should be of opinion that they were not entitled to recover, upon the following facts, which appeared upon his lordship's report.

Nothing turned upon the date of the commission and assignment. The petitioning creditor was *F. Tappenden*, to whom the bankrupts stood indebted in the sum of 610l. In the middle of *January*, 1802, the bankrupts found themselves in insolvent circumstances, and a general meeting of their creditors was called on the first of February, 1802; when it was proposed, that an assignment of the bankrupts' effects should be made in trust for the benefit of the creditors. Another meeting was afterwards had on the 12th of February, when the business was further

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" writ the said court is hereby directed and authorized to issue, " if such defendant or defendants be in the prison of such city or " town corporate; and if he, she, or they be not in such prison, " to commit such defendant or defendants to the gaol of such " next adjoining county, and to cause the prosecutor's witnesses " against such defendant or defendants to enter into a recogni- " zance or recognizances to prosecute and give evidence against " such defendant or defendants at the sessions of *oyer* and *terminer* " and general gaol delivery for such next adjoining county; and " that the same proceedings and trial shall be had, and the same " judgment shall be given in such last mentioned court of *oyer* " and *terminer* or general gaol delivery, as would and might be " had and given in cases of indictments or inquisitions for the " like offences committed within such next adjoining counties."

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considered by the creditors, and an order was given to the attorney to prepare a deed of assignment to *Tappenden* and the rest of the plaintiffs, as trustees to sell the stock in trade, book debts, and other effects of the bankrupts, for the benefit of the creditors. This deed was executed by several persons, and by all the trustees, and each of the plaintiffs except *Tappenden*. But upon his refusing to come in under the assignment, the rest of the creditors determined that a commission should be sued out, and the deed was executed on the 23d of March with that intent; but the *bankrupts* were not then made acquainted with the intention of the creditors, and executed upon the belief that it was to be acted upon in order to prevent the necessity of a commission. This deed contained a proviso that it should be void in case any of the creditors should not sign. It was expressly in evidence "that *Tappenden* never *agreed* to execute the deed of trust; that, when the *deed* was *prepared*, it was not intended to make *Blinkhorn* and *Co.* bankrupts, in case all the creditors should not *come in*; but that, on the *execution* of the deed it was so intended." Immediately afterwards, *Tappenden* sued out a commission of bankruptcy against *Blinkhorn* and *Co.* and was chosen assignee, together with the rest of the plaintiffs, and the assignment of all the bankrupts' effects, as above, was relied on as the act of bankruptcy.

Two objections were taken. *First*, that this assignment under the above circumstances was not an act of bankruptcy. *Secondly*, that the action could not be maintained, because *four* of the plaintiffs had signed the deed.

ERSKINE and GURNEY, *for the plaintiffs*. "The first question here is, whether if a bankrupt agrees to assign all his effects for the benefit of his creditors, and afterwards executes a deed to convey all his property to trustees for their use, this is an act of bankruptcy? This has been held so in *Harman* v. *Fisher*,* where the principle of the law is clearly laid down by Lord Mansfield, C. J. 'Be-

* *Cowper*, 123.

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cause this, like other acts of bankruptcy, is a *symptom* of *insolvency*, and that the bankrupt is no longer able to carry on his business; and notwithstanding he wishes to act honestly, yet if one creditor *holds out*, and has a debt of a sufficient amount to make him a bankrupt, he may sue out a commission.' This has been further considered and acted upon in the cases of *Bamford* v. *Baron*,* and *Eckhardt* v. *Wilson*.† The distinction set up here is, that the *deed*, although executed, was not intended to be *acted upon*, but was merely for the purpose of making the parties bankrupts. But it is part of the report of the learned judge, that although the first purpose of the creditors was altered, yet when the deed was executed by the bankrupts it was without any knowledge that it was for the purpose of making them bankrupt, and it then stands merely as a deed executed by them, without intending it as an act of bankruptcy, and there is nothing from which to infer any *collusion* between the bankrupt and the creditors. *Tappenden* never was a party to this deed, nor in the least assented to it, and was not prevented from proceeding at law against the bankrupts; and if he could sue at common law, notwithstanding this *deed*, he may take out a *commission of bankruptcy* against them; and cannot be injured by the acts of the other creditors, to which he was not privy, supposing them *fraudulent* upon the bankrupts. As to the other objection, that the plaintiffs, who were parties to the *deed*, could not maintain an action; although they may not, before a commission, sue the bankrupts at common law, or take out a commission, yet *here* they are suing not for themselves, but for the benefit of the creditors at large, and as mere trustees."

WOOD, *for the defendants*, here stated, that there was a proviso in the *deed* to make it void on the refusal of any creditor to *come in under* it.

[Lord ELLENBOROUGH. "But it is to be valid in the

* 2 *Term Rep.* 594. † 3 *Term Rep.* 140.

mean time, and that is exactly the same thing for the purpose of this argument."]

GIBBS, *for the defendants.* "The execution of this deed was *not* an act of bankruptcy, for it has been obtained by means which amount to a fraud in law upon the bankrupts; and this case is unlike all others that have been as yet before the court. When the deed was delivered to the bankrupts to be executed, it was resolved, that the trusts of it should never be carried into execution, but that B. and Co. should be made bankrupts. It was therefore resolved, that the very execution of the *deed* should make them bankrupts, and it can never be said that here was any thing like a fraud even in law, intended by the bankrupts against any of their creditors by this act. On the contrary, this is a scheme by the creditors to *cheat* men into an act of bankruptcy, and when they did it they had the means of making use of the deed either for the purposes of the trusts or to convert it into an act of bankruptcy. Now four of the plaintiffs are parties to this fraudulent conveyance, and they cannot take advantage of it.

Lord ELLENBOROUGH. "They cannot become petitioning creditors, because they cannot say they are prejudiced by it, and the petition proceeds on the supposition that they are prejudiced by it."]

"It is indeed said, in answer to my objection, that here they sue as trustees; but then I say that the creditors ought to have chosen other assignees; for if this deed be confessed by the trustees to be fraudulent, the evidence of the declarations of trustees is conclusive against the *cestui que trusts*, and the creditors who sue through them are bound by their acts. In *Bauerman* v. *Radenius** I was nonsuited upon that ground; and it made a great difference in the argument, whether it is only evidence to be rebutted by other evidence, or *conclusive evidence.*"

[LE BLANC, J. "Of what are the confessions or acts of trustees conclusive?"]

* 7 *Term Rep.* 663.

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GIBBS. "That they are parties to the fraud, that they are parties also to the *fraudulent* deed, and shall not set it up as the means of founding any claim upon it."

WOOD, *on the same side.* "In order to make an act of bankruptcy there must be a *fraudulent* conveyance, to the intent that the debt of the creditor may be delayed. There must therefore be a *complete* fraudulent *grant;* and to make the *grant* complete, it is necessary that it should not only be executed by the grantors, but that it should also be *accepted* by the trustees."

[Lord ELLENBOROUGH, C. J. "Is it not complete if four trustees out of five accept it?"]

WOOD. "It does not so appear upon the evidence."

[GROSE, J. "Did not the four trustees *sign* the deed?"]

[Lord ELLENBOROUGH, C. J. "They accepted the trust for *all* the uses which they *can* make of it; and *one* of those uses is to make the parties bankrupt."]

WOOD. "Is it competent for men to insist that this is a *fraudulent* conveyance to which they are parties?"

[Lord ELLENBOROUGH, C. J. "Is there any case to *estop* any but a petitioning creditor?"]

WOOD. "There are no cases directly decisive of that point, but I submit that a party to a deed cannot insist upon its being fraudulent when he *assents* to it by submitting *himself* to be made a trustee under it?"

[LAWRENCE, J. "How is it so when he contends that the deed itself is an act of bankruptcy?"]

Lord ELLENBOROUGH, C. J. "We will consider first, the objection as to *Tappenden;* had he been a party to the deed he could not have availed himself of it to be a petitioning creditor,* because he could not say that *he* was prejudiced by a deed to which he was a party and gave his assent. But *Tappenden* is clear of that objection, because *he* never executed the deed nor assented to it. Then it is said, however, that the objection does apply to the other assignees, and that they being parties to a fraudulent pro-

* 2 *Bamford* v. *Baron*, 2 Term Rep. 594.

curement of an act of bankruptcy, shall not be even the *instruments* of carrying it into effect. But there is no case hitherto which has gone the length of saying that a creditor, who has been a party to the instrument on which the act of bankruptcy is founded, shall not be an assignee to sue for the general benefit of the creditors; and it must be observed also, that the assignees come in by the election of the other creditors, and need not necessarily be creditors themselves. How shall they then be disabled from suing in that character, because they have been parties to this transaction, which I do not consider as a fraud, because they might have acted upon the deed as a conveyance to them, and undertaken the trusts, or have considered it as an act of bankruptcy, which they do *here*. But as to the bankrupts, their purpose of fraud in law was complete; they intended to part with their property, and they effected it as far as they could, and but for the act of the creditors, would have done that which would have rendered them unable to carry on their business, and would have *delayed* the payment of the debts of those who did not *come* in under the deed. It only remains to consider the personal objection to the trustees suing in this action; but there are no cases which go to support that objection, and there would be great inconvenience if persons who are elected assignees, and with whose private transactions the creditors are not acquainted, should be prevented from suing for the benefit of those creditors on account of some personal act of their own. It seems to me, there is neither justice, nor reason, nor policy, in determining that such a *personal* objection should be available to the defendants."

GROSE, J. was of opinion, that the act of bankruptcy was complete by the signing of the deed by the bankrupts; and that when the statutes concerning bankruptcy thereby began to operate against them, the personal objection which had been taken to the assignees could not prevent those statutes from taking effect, so as to deprive the creditors of the benefit which they would otherwise have under the commission.

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TAPPENDEN & al. versus BULLER.

LAWRENCE, J. "The argument for the defendants has gone a great deal upon confounding the case of a petitioning creditor with that of an assignee. The former indeed cannot be made the instrument of suing out a commission where he has been a party to the deed which constitutes the act of bankruptcy; but the same objection does not hold good with respect to the latter, and there is no question but that the action could have been supported if any other persons than the assignees had been parties to the deed, which was clearly an act of bankruptcy. For *Tappenden* was entitled to apply to the Chancellor by petition, in order to have the effect of the commission, and have the property conveyed to the assignees for the benefit of the creditors, for he never assented to the deed, which alone could have barred him from petitioning in order to take out a commission. And the *goodness* of a commission does not depend on the choice of the assignees, but upon the act of bankruptcy and the petitioning creditor's debt, which are in this case *both* sufficient to support it."

LE BLANC, J. "Two objections have been made in this case. *First*, that there is no act of bankruptcy, because the deed, at the time it was executed, was agreed not to be carried into effect; and *secondly*, if it be so, yet the present plaintiffs cannot *set it up* as an act of bankruptcy. But I think the act of bankruptcy was *complete*, notwithstanding that circumstance, because there was a *fraudulent* conveyance, in which a *fraud* in law upon the creditors was intended by the bankrupt, and it only depended upon the creditors, and not the bankrupts, whether they would give effect to it. But as far as concerned the bankrupts, they could not have prevented it from taking full effect, and therefore with respect to them it was a complete act of bankruptcy. If the objection which applies to a petitioning creditor should be carried so far as to prevent the persons who have signed a deed of trust or letter of license from being made assignees, it would be a very easy thing for a bankrupt to prevent any others from being chosen assignees if a majority of his creditors in number and value had *come in* under the assignment;

and then although a commission should be sued out by the other creditors, they would never have the benefit of it."

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TAPPENDEN & *al.* *versus* BURGESS.

Lord ELLENBOROUGH, C. J. "It really brings the question to this, that the commission shall be good or bad according to the choice of the assignees."

RULE TO ENTER A NONSUIT DISCHARGED.

LEICESTER *versus* ROSE.—*Thursday, Nov.* 24.

A CREDITOR signs a deed to give his debtor time for payment of the whole of his debt, upon having security for part, and several other creditors are thereby induced to sign the deed; but at the same time he secretly obtains the security of a third person for so much as stands in the trust deed on the personal security of the debtor alone: Held, that this is a fraud upon the other creditors, and the additional security is void.

Letter of license. Additional security to creditor, how void.

Semble. The case of *Feise* v. *Randall** can only be supported on the ground that no *fraud* was understood to have been effected on the creditors.

THIS was an action in *assumpsit* upon a special agreement. Nothing turned upon the form of the action, but the substance of the declaration was shortly as follows; A certain deed of trust had been prepared, dated the 5th of August, 1801, whereby, after reciting that *W. Thompson* and *E. Leadbeater*, being unable to pay all their creditors the whole of their debts, had proposed to pay them by instalments, that is to say, one-eighth in one month, one-eighth in three months, one-eighth in six months, one-eighth in 12 months, two-eighths in 18 months, and the remaining two-eighths in two years; it was therefore agreed that the 1st, 2d, 3d, and 4th instalments should be secured by the promissory notes of *Thomson* and *Leadbeater*, one moiety thereof to be made payable to and be endorsed by *Messrs.*— and *Shaw*, and the other moiety to *Messrs. B. F.* and Co. those houses having agreed to become security, and the two last instalments by the promissory notes of *Thompson*

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* 6 *Term Rep.* 146.

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and *Leadbeater* only. That at the time of the making of the agreement after-mentioned, *Thompson* and *Leadbeater* were indebted to the plaintiff in 1765*l.* and by an agreement on the 3d of September, 1801, reciting the trust deed, &c. and that the plaintiff having been applied to to execute it, had refused, conceiving they had a *security*; the defendant, in order to induce the plaintiff to sign the trust deed, undertook and promised that he would within six weeks give sufficient security, to the satisfaction of the plaintiff, to secure the latter instalments agreed in the indenture to be paid by the notes of *Thompson* and *Leadbeater* only. That the plaintiff, relying upon this promise, executed the trust deed accordingly; and the breach was, that the defendant did not within six weeks give, nor yet had procured, to the satisfaction of the plaintiff, or in any other manner, security for the two last instalments, or either of them.

This cause was tried before Lord ELLENBOROUGH, C. J. at the sittings for *London* after the last term, when the plaintiff proved his case. *J. Thompson* proved, that he applied to the plaintiff to sign the deed of *composition*, which he refused unless he could get the two other instalments secured also. The other creditors would not sign until he did. Afterwards he signed, and then three other houses at *Liverpool*, who had refused to sign unless *he* did, signed the deed. When the instalment became due for which *Rose*, the defendant, had agreed to procure security, the note of *Thompson* and *Leadbeater* was not paid, and *Rose* refused to take it up or give security. Upon these facts his lordship directed a nonsuit, on the ground of fraud being practised upon the creditors, and leave was given to move to set it aside and enter a verdict.

Accordingly a rule to shew cause was obtained by ERSKINE on the 10th Nov. who cited *Feise* v. *Randall** to shew that when the collateral security leaves the insolvent in the same condition, the case does not come within

* 6 *Term Rep.* 146.

the rule adopted in *Cockshott* v. *Bennet*,* and the other cases relied upon by the defendant. 1803.

LEICESTER versus ROSS.

GARROW, GIBBS, and LAWES, *for the defendant.* "The case is shortly this. *Thompson* and *Leadbeater* enter into an agreement with their creditors that their debts shall be paid by six instalments: The four first are to be secured by certain houses in trade, who are to be supplied with the funds by *T.* and *L.* but with respect to the two last instalments, the body of the creditors are to be contented with the single security of the debtors. The plaintiff desires to get more; he says all applications to him will be vain unless they give him other security; which he obtains. This case therefore goes beyond all other cases; for they proceed upon the ground, that other creditors would *probably* be induced to sign on the faith of the signature of the party obtaining the additional security. Here it is not left to *conjecture*, but it is expressly stated that the other creditors *could* not be induced to sign without the plaintiff agreed. This was held out as an inducement to him to do so, and in consequence of his (Leceister's) signature the other houses immediately signed the deed. There is no sense in the distinction attempted to be raised, that the funds are to come out of other hands, and that therefore the situation of the insolvent is no worse; for in almost all cases of insolvency the funds are made up out of the benevolence of the insolvent's friends. The true principle is, that a greater advantage shall not be obtained by one creditor than by another. When any person has been induced to enter into an agreement as security for another, and the representations made to him are false, the agreement is void. *Jackson* v. *Duchaire*.† If in a case of this kind one man gets more than the others, it is a *fraud* upon them; for, had they known it, they would have become competitors with him in endeavouring to obtain that additional security. All the other creditors suppose that the bank-

* 2 *Term Rep.* 763. † 3 *Term Rep.* 551.

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rupt has exhausted all his funds for their benefit, and has procured as much as he can to pay them with.

[Lord ELLENBOROUGH, C. J. "It is admitted by the plaintiff, that if a further sum was to be obtained it would be bad; but this is only to give a *better security* for the same sum."]

"This is something which the bankrupt *could get* at the time in order to pay his creditors, or secure to them the payment of their debts, and to which all the creditors are alike entitled. The fallacy of the distinction now made is, that it looks only to the state of the insolvent's affairs after the agreement is fully performed, and supposes that it will be performed; and then all the creditors being paid, none would be injured. But at the time of making the agreement the situation of the creditors is different. They expect to have the whole of their money, they agree to give time and take *security* for the payment of part of it, and then *one* is placed in a better situation than the rest by having *security* for the whole. Even in *Feise* v. *Randall** the principle that one creditor should not be put in a better situation than another is clearly admitted, but *that* is very distinguishable from the present case; for the court was of opinion upon the facts of that case, that there was no fraud; but here a fraud upon the creditors is expressly stated. For it cannot be doubted that *those* who refused to sign the deed until the plaintiff signed, apparently upon equal terms with them, would still have refused to sign if they had found that he obtained better terms.†

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* 6 *Term Rep.* 146.

† Some allusion was here made to a letter which had been read, but was not set out in his lordship's report, from which it was inferred that the plaintiff had considered himself as deluding the other creditors. In this letter he spoke of relying upon the defendant's honour, which, it was argued, implied a desire for secrecy.

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LEICESTER *versus* ROSE.

In *Smith* v. *Bromley*,* Lord Mansfield, C. J. relied much upon the ground of oppression upon the friends of the bankrupt or his family, as well as the fraud on the creditors, and said, it was taking an unfair advantage of his friends.

ERSKINE and WOOD, *contra*. "This case is clearly within the case of *Feise* v. *Randal*,† and differs from those which have been cited in principle. The ground upon which they went is, that in this sort of agreements, as the creditors do not insist upon the utmost *rigour* of the law, but are disposed to take less than their just demands, a person who comes into such an agreement shall not recover upon a subsequent agreement for a greater sum, because the first being for the benefit of the insolvent, of which the foundation is, that he shall be delivered from the rigour of having the whole demand exacted by his creditors, the insisting upon more is a fraud on the creditors, and a contravention of that agreement. But that is not the case here, and *Smith* v. *Bromley*‡ does not fall within the same class of cases. But where this question has come directly before the court, that has been the principle laid down and adhered to by Lord Kenyon at all times. *Sumner* v. *Brady*§ does not affect this case.—Here it must be observed, there was no actual meeting of the creditors to release the insolvent, upon these terms, and if there is not, each man may make a distinct contract for himself.

[Lord ELLENBOROUGH, C. J. "That is supposing he does not thereby induce other persons to sign."]

"*Non constat*, that *Rose* entered into the agreement in consequence of any communication with the insolvent, and if a third person voluntarily give a security without the request or concurrence of the insolvent, there would be no obligation upon him to pay."

[THE COURT. "Would not the friend *Rose* have had an action afterwards against the insolvent for money paid?"]

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* *Dougl.* 670, *n.* † 6 T. *Rep.* 146. ‡ *Dougl.* 670, *n.*
§ 1 *H. Bl.* 647.

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LEICESTER versus RUSE.

"Then still the debtor is in a better situation; for he is not to be called upon for immediate payment; he is delivered from the severity of the creditor, and put upon the clemency of his friends; and the agreement is performed. But it would be extremely hard to say that every creditor must give up as much of his debt as another, in all cases, in order to put the benevolence of all upon the same level; for that which would be only prudently generous in one, would be wrong in another. Here the plaintiff has a better right to security than others, for he refuses to sign because he conceives he has a collateral security. Here was no *concert* with the rest of the creditors when the deed was signed; and in *Cockshott* v. *Bennett*, Lord Kenyon, C. J. dwelt a great deal upon the fraud by varying from the agreement which was made in *concert* with the rest of the creditors."

LAWRENCE, J. "Does it appear in that case to be any thing more than implied, from all the creditors signing the same instrument?"

Lord ELLENBOROUGH, C. J. "Is not that the effect of all these agreements? The deed is signed upon the tacit general consent of all. *Res ipsa loquitur.* The act of signing the trust deed implies as much as a general meeting for the purpose. I was in *Cockshott* v. *Bennett*, and it was no fact in the case, that there was an actual assembly of the creditors. Lord Kenyon assumed it as a probable or apparent thing in the nature of all these cases.—I own this is a case on which, from the first statement of it, to the present time, I never entertained one *particle* of doubt. The question is, whether an agreement by which one creditor is to obtain for his debt a better security than another, when he has entered into an agreement with the rest of the creditors, importing an equality for all, is to be considered as valid in law? Now as the debt was not to be paid in monies numbered at the time, but by instalments, it made an essential difference, whether it was to rest on the security of the insolvent alone, or of some other person; and that difference apparently is between payment and non-payment. In *Feise*

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v. *Randall* it is stated that there was no fraud, and we must therefore take it so. But is there no fraud *effected* here? Is there no actual purpose of fraud? The plaintiff is told at the time, that the creditors will not sign unless he does; and he uses it as a means of enforcing from the insolvent's friends another security, and then he signs this deed, purporting that he has no other security, the other creditors at the same time signing in full *simplicity*, and supposing that all are alike. In many of the cases, such as *Jackson* v. *Duchaire*, there was *more* obtained from the debtor; but that seems an immaterial distinction, for the court always went on the ground of fraud upon the rest of the creditors, who relied on a mutuality in the agreement. Lord Kenyon said there that 'not even the feelings of the friends should be wrought upon.' I am quite satisfied that he whose mind, abounding with all legal knowledge, was yet particularly well informed on this subject, would have decided this case shortly; and I am quite sure we should not have had the benefit of hearing this argued at the length at which it has been discussed. *Feise* v. *Randall* was decided only on motion; and, therefore, ought not to overturn the principles which were before relied on in the other cases. I do not go on the ground of acting on the compassion of friends, because I do not know, in that case, how far I may go, since it is difficult to say what is or is not obtained in that manner, when any security is obtained from the friends. *Bromley* v. *Smith* was decided upon the ground that the plaintiff ought to have done that without any pecuniary inducement, which he refused to do, unless security was given for his debt. But this is a fraud upon the rest of the creditors."

GROSE, J. "The question is, whether any fraud was worked upon the creditors? Now what was the agreement between the whole of the creditors? They agreed to take their debts by instalments, and the two last instalments were to be secured by the promissory notes of the insolvents; and if by holding out, the plaintiff gets a *better security*, this I think is a fraud upon the rest

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of the creditors, because they would not probably have consented to the agreement without being in the same situation. Indeed, was it ever intended by the agreement that he should have been in a better situation than the rest of the creditors? No—for they say that they will not sign unless he has signed; that is, they will not sign without being in as good a situation as he. *Feise* v. *Randal* went off merely upon the first motion for a new trial, and Lord Kenyon in that case did not conceive that there was any fraud; but in this case there clearly is fraud; and therefore the plaintiff ought not to recover."

LAWRENCE, J. made some observations on the facts of the case, and said, "It is clear that several of the creditors would not have signed without the plaintiff had signed. In *Jackson* v. *Lomas*,* BULLER, J. lays down as a rule, that 'a secret agreement made between the insolvent and some of the creditors, in order to induce the rest of the creditors to come into the composition, is void.' Is not that exactly this case? On the authority of that case, the trust deed might be considered as an agreement that he (the plaintiff) would come in *pari passu* with the rest of the creditors, and this agreement with the defendant is a secret agreement to be put in a better situation than they were; which is void for the fraud."

LE BLANC, J. "It is admitted, that if there is a fraud upon the creditors in this case, the agreement is void; and the contest has been merely, whether this is a fraud, it not being an agreement to obtain more money than the other creditors, but only to obtain security to be paid the same sum, when the other creditors have not a security. There is a fallacy in stating *that* as the criterion of fraud. It is just the same whether he (the plaintiff) is to receive more money, or whether he is to receive that which *he* thinks likely to produce more money in the end. This agreement is not strictly a deed of composition, because the party is to pay all the money due; it is rather a letter

* 4 T. Rep. 166.

1803.

LEICESTER *versus* ROSE.

of licence, and the terms of it are, that the debtor shall give security for part only of the money; but still the same principle applies, as if it were a deed of composition. It is not material whether the creditors signed all at the same time, at a general meeting, or whether the deed was carried round to each, to be signed separately; for they say in either case, in substance this; "that they will not sign, unless all the creditors agree to do the same." There appears to me, therefore, no difference between this and the other cases, in which, more money was obtained of the debtor.—If these terms are not complied with, it is equally within the principles laid down, equally a fraud on the rest of the creditors.

This certainly clashes with the opinion delivered in *Feise* v. *Randall*, but if that case had been presented to the court with the circumstances of fraud which have appeared here, the opinion of the court would have been very different. POSTEA TO THE DEFENDANT.

THE KING *versus* BUCKLE.—*Saturday, Nov.* 20.

THE act of selling a single piece of plate exceeding five pennyweights, does not constitute a trader within the Stat. 31 Geo. 2. *c.* 3. *s.* 6. *so as to subject the party to a penalty for not taking out a licence.*

Selling plate above 5 dwts. Stat. 31 G. II. c. 3.

THE KING *versus* BUCKLE.

THIS was a case reserved upon an appeal to the quarter sessions at Peterborough, for the opinion of this court, on the following conviction before two justices.

City and Liberty of Peterborough in the County of Northampton, to wit, &c.[*]

—Barker, supervisor of excise, as well for his majesty as himself, exhibited before W. S. and F. W. two justices, &c.

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[*] The formal parts of this conviction, are omitted at each place where the *et cetera* occurs.

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The KING *versus* BUCKLE.

residing near to the place where the offence hereinafter mentioned was committed, a complaint and information on oath, &c.

That *Samuel Buckle*, after the fifth day of July, 1759, and before the day of exhibiting this information, and within three months now last past, to wit, on the 23d of October, 1792, to wit, within, &c. did presume to vend and sell a quantity of silver plate, exceeding five pennyweights, in one separate and distinct ware, or piece of goods, without first taking out a licence for that purpose, according to the form of the statutes in that case made and provided, before he so presumed to vend and sell such piece of goods and ware, contrary to the form of the statutes in that case made and provided, by reason whereof, and by force of the said statutes, the said *Samuel Buckle* hath, for his said offence, forfeited the sum of twenty pounds, of lawful money of Great Britain. Whereupon, &c. And afterwards to wit, on, &c. at, &c. the said *S. Buckle* having been previously duly summoned, &c. he, the said *Samuel Buckle* appears before us, &c. and thereupon the said *Samuel Buckle* says, that he the said *Samuel Buckle*, is not guilty, &c. whereupon we the said justices, do now here proceed to examine into the truth of the said matters of complaint, &c.

The conviction then set out the evidence; which was, that Buckle had sold to one Abbott, an inn-keeper, a single tankard for eight pounds, being the price set upon it by a silversmith, as a fair price between them, and that he offered seven guineas for it as a tradesman, to sell again.

The defendant was therefore stated to be convicted, and the conviction concluded with an adjudication, that the said S. B. hath, for his said offence, forfeited the sum of 20l., but we, (the said justices) do mitigate the same to the sum of five pounds two shillings and sixpence, &c.

At the general quarter sessions held at Peterborough, on the 12th day of January, 1803. Before, &c. *Samuel Buckle* entered his appeal against the above conviction, and the same was affirmed, subject to the opinion of

the court of King's Bench, on the following question; Whether the selling one single article of silver plate above the weight of five pennyweights, and under the weight of thirty ounces, constituted a trader, within the meaning of the statute of the 31 *Geo.* 2. c. 32. § 6. so as to subject the party to a penalty for not taking out a licence. 1803. The KING *versus* BUCKLE.

This case was to have been argued by WOOD, for the prosecution, and READER and B. HART, for the defendant;

BUT THE COURT, *without argument*, quashed the conviction, on the ground, that the selling of a single article did not constitute any person a trader, within the act*.

THE KING *versus* the Inhabitants of KING'S PYON.

A PAUPER hired for a year at the wages of 45s., and two pounds of wool, if she behaves well, is dismissed by her master at the end of eight months, on a dispute arising between them; she applies to a magistrate, who upon hearing the matter, orders that the master shall take her into his service again, or pay her a year's wages; the servant consents to return; the master refuses to take her, and pays the wages for the year, without the wool. She afterwards applies to be hired to other persons within the year: held, this is a dissolution of the contract, within the year, and the servant gains no settlement under it.

Pauper. Service. Dissolution of contract.

THIS was a case upon an appeal at the general quarter sessions, in and for the county of Hereford, on the 12th day of July, 43 Geo. 3, 1800, against an order by two justices, for the removal of *Alice Wheale*, single woman, from the parish of Weobly to the parish of King's Pyon in that county.

The KING *versus* Inhabitants of KING'S PYON.

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* *Ex relatione.* B. HART.

1803.

The KING *versus* Inhabitants of KING'S PYON.

The case stated, that the pauper was hired to *M. Davies* of King's Pyon, to serve him from Old May-day, 1800, to Old May-day following, at the wages of forty-five shillings, and, if she behaved well, two pounds of wool; that she served him until the Saturday after Christmas-day, being about eight months, at the end of which time a dispute happened with her master, about some stockings which had been burnt, and he dismissed her from his service.

That she applied to a magistrate for the county, Mr. *Troughton*; and when she appeared before him, she was charged by the master, with having neglected his *feeding-pigs*, by not giving them water; which she denied, and also respecting the burning his stockings: that she was desirous of continuing in his service, but her master refused; and the said magistrate ordered that her said master should take her back into his service, or pay her the whole of her wages. He refused to take her again, and paid her the whole of the money, but not the wool. That the pauper, from the time she received her wages, offered herself as a servant, soon after, to several persons. On cross-examination, the pauper admitted she had worn her mistress's stockings once or twice when she was wet, but that no charge was made against her on that account before the magistrate. The same magistrate who made this order of adjudication, joined in the order of removal. The Court adjudged, that the pauper's said master, by paying her wages, though he did not receive her again, dispensed with the remainder of her service, and therefore confirmed the order of removal.

WILLIAMS, Serj. and CLIVE, *in support of the order of removal.* "This was not a dissolution of the contract between the master and the servant, but only a dispensation of the service for a part of the time. A contract between two persons cannot be dissolved by the act of one of them only; both must consent to the dissolution of it, or else the contract still continues. Here it is stated in the case, that "the servant was desirous of continuing in her service," and therefore it cannot be presumed that she gave her assent to the order of the magistrate, con-

sidering it as a dissolution of the contract. On the contrary, it was the master who refused to take her back into his service, having before wrongfully dismissed her. The magistrate should then have ordered him to take her back. Instead of which he made a wrongful order in the alternative, either that the master should receive her again into his service, or pay her the whole of her wages for the year. This order cannot therefore bind the servant, because, although it was submitted to, by her, it was not agreed to. ASHURST, J. in the case of *the King* v. *St. Phillip*, in Birmingham*, expressly lays it down as a rule, that "although an agreement between the master and servant, before the expiration of the year to put an end to the service, will defeat the settlement; yet if it be not a *voluntary* agreement between the parties to put an end to the contract, as if the master wrongfully discharges the sevrant before the end of the year, that will not defeat the servant's settlement, and then he proceeds to shew, that in that case there was a *wrongful* discharge, by the mistress *submitted to*, but not agreed to by the servant."

BULLER, J. considered it as a clear case, and relied upon he payment of the year's wages, as shewing that the mistress there was convinced that she could not dissolve the contract before the end of the year." These cases are very similar; the chief difference is only in the length of time of the service dispensed with; the one being for eight days, and the other for four months, but even that is immaterial. For if a dispensation be allowed for any time, it is impossible to fix a limit, and Lord Kenyon, C. J. in the *King* v. *East Shefford*†, says, "I wish that those who used such an argument, namely, that the absence in one case, being for a shorter period than another, made a difference in the case, would have drawn the line, and given us the *ne plus ultra*."

[LAWRENCE, J. "In *the King* v. *East Shefford*, the absence was at the beginning of the year."]

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* 2 T. Rep. 624. † 4 T. Rep. 804.

1803.

The KING versus Inhabitants of KING'S PYON.

WILLIAMS then cited *the King* v. *St. Mary, Lambeth.** And added, that service for the year had never been required with the same strictness as a hiring for the year; because the master, if it were strictly necessary to serve the whole year, might so order it that the servant should never gain a settlement. And therefore unless the servant *consents* to the dissolution of the contract, the settlement does not fail by the cessation of the service within the year.

Lord ELLENBOROUGH, C. J. *without hearing the counsel on the other side.* "Does not the servant in this case acquiesce afterwards, by offering herself to another person to be hired? Put this question—whether either the master or the servant could, after what happened, in this case have compelled the performance of the contract within the year? If we were now to lay down a rule, perhaps it would be better not to admit of any dispensation with the year's service, considering, that under the words of the statute,† "*continuing* and *abiding* in the same service during the space of one whole year," is required to gain a settlement. Cases, however, have occurred too strong to be now overruled, that actual service is not necessary, where there is not a dissolution of the contract. But Lord Kenyon has clearly laid down the rule on that head, that, whether it is a dissolution of the contract or not, depends upon, whether either party could afterwards legally compel the performance of the contract. Whether the master had or had not a right to dismiss the servant on account of his misconduct, in this case, they both chose the magistrate as an *arbitrator*, and acquiesced in his decision; the master paying the wages for the year, and the servant applying to other persons to be hired. The cases which have been decided on this statute seem to have gone upon an erroneous notion, that it is a benefit to the pauper to acquire a settlement; as if she might not as well have her settlement at one place as another, and

* 8 Term Rep. 236.

† 8 and 9 Will. 3. c. 30.

as if she would not, in all events, be entitled to support, as one of the *casual poor*. After these decisions however, Lord Kenyon's rule is the proper one, and we will not carry the doctrine any further. 1803. THE KING *versus* Inhabitants of KING'S PROC.

GROSE, J. LAWRENCE, J. and LE BLANC, J. concurred in the same opinion, and said "that to hold this not to be a dissolution of the contract would be to carry the doctrine of dispensation further than the decisions had hitherto gone. That the circumstances of the servant being discharged, and applying to a magistrate afterwards to settle the dispute between herself and master was clearly a dissolution of the contract. For in that he must be considered as an arbitrator, and she acquiesced in his decision.

ORDER OF SESSIONS REVERSED.

The KING *versus* the Inhabitants of SUDBROOKE.—*Same day.*

A PAUPER settles at S. is afterwards hired for a year in another parish; he serves a part of the year, and then being too ill of a fever to do his work, his master pays him his whole year's wages and he quits his service and goes to an hospital; held, this is a dissolution of the contract, and that no settlement is gained. Pauper. Service. Departure. Sickness.

THIS was an appeal to the general quarter sessions, holden at the city of Lincoln, 16th July, against an order of two justices for the removal of *G. Peacock*, and *Elizabeth* his wife, and *Elizabeth* her daughter, aged two years, from the parish of St. Michael, in the city of Lincoln, to the parish of *Sudbrooke*, in the county of *Lincoln*, upon the following case: The King *versus* Inhabitants of Sudbrooke.

Geo. Peacock, the pauper, settled at *Sudbrooke*, about the beginning of May, 1796, hired himself to Mr. *Fitzhugh*, of Portland-place, by the month, at monthly

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wages, under which hiring he served near three months, when his master said he should want him for a continuance; they agreed for a year, at twelve guineas wages. The pauper said he considered the first contract at an end, although he did not then actually leave the service. He lived with Mr. *Fitzhugh* under the yearly hiring, till about the end of April, 1797, when being too ill of a fever to do his work, his master paid him his whole year's wages, and he left his master's service, and went down into the Lincoln Hospital, and never returned to the service of Mr. Fitzhugh.

The case being removed into this court, TORRINGTON and D'EWES COKE, *for the appellants*, were called upon to distinguish it from the last, which they endeavoured to do at some length, by referring to *the King* v. *Christchurch*,* as an authority in point, and comparing the circumstances of that case with the present.

"In that case Lord Mansfield said, that sickness, being the act of God, is not a cause for the master to turn away his servant and determine the contract. In this case therefore, the service must be considered as only interrupted, without dissolving the contract. *The King* v. *Whittlebury*,† is very distinguishable from this case. For there the servant being taken ill within five days of the end of the year, while he was gone to a statute fair, to seek for another service for the next year, sent for his clothes and his wages, and the master deducted one shilling for the remainder of the year; this the servant accepted, and GROSE, J. considered that fact as conclusive of a consent to put an end to the contract. Indeed in all the cases where the contract is held to be determined, there has been a deduction out of the wages; but here the master pays the whole of the wages, which is strong evidence that he considers the sickness not as a ground of dissolv-

* *Burr. Sett. Cases*, 494. 2 *Const.* 507. † 6 *Term. Rep.* 464.

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ing the contract, but merely as a dispensation of the service.

HOLROYD and T. W. CARR, *è contrà*. *The King* v. *Christ-church* is very distinguishable from the present case There were no circumstances from which to infer a dissolution of the contract in that case. *Maxey*, the servant, was removed, on account of her fits, to one Mrs. *Lemonier's*, at the desire of her master; but if she would not receive her she was to return to her master's house. Nothing like dispensation is to be found in this case; for it is expressly stated, that the pauper *left* his master's service, and the magistrates properly considered this as a dissolution of the contract. And sickness is a reasonable cause for an agreement for such dissolution, as well as for a dispensation with the service. No *animus revertendi* appears, and but for the circumstance of the servant being ill, this exactly resembles the case of *the King* v. *Castle-church** ; and there the whole of the money was paid, which as Lee, J. says, might be only an act of benevolence in the master. *Pawlett* v. *Burnham*† was also cited, and *Sheen* v. *Godalming* ‡.

Lord ELLENBOROUGH, C. J. "If ever there was a statute which required a strict construction, it certainly is this statute of the 8th and 9th W. 3. c. 30, for by adhering to the letter of it, there would have been great facility and convenience in determining the place of settlement of the pauper without any inconvenience to countervail it. The interest of the pauper is indeed by no means affected by this statute, and his benefit, which has been considered a reason for departing from the words of the statute, really affords no ground for it. He has only a benefit in being intitled to support, in virtue of a settlement, at some parish

* 2 Burr. S. C. 68.

† From a MSS. note by Mr. *Ford*, in *Bott*'s Poor Laws, last edit. vol. ii. p. 307.

‡ *Bott*, last edition, vol. ii. page 310.

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or other; but the gaining of a new settlement is really nothing to him. Each case therefore resolves itself into a question between the two contending parishes, according to strict law, and I should have thought it better never to have allowed of the doctrine of dispensation with the service. By some means that distinction has obtained in the cases, but it must always be understood with the qualification, that the parties in dispensing with the service contemplate the continuance of the contract. And that question is properly determined by Lord Kenyon to depend upon whether either party could, under all the circumstances, enforce the performance of the contract or not. In this case could either party have brought an action against the other; one for non-reception, the other for non-return into the service? No lawyer could have framed such an action, either against the master for not receiving the servant, or against the servant for not returning to his master; and then if the contract be destitute of all means of enforcing its performance, it must be considered as absolutely dissolved.

As to the case of *the King* v. *Christ-church*, taking all the circumstances together, the parties did continue the contract. All that was done there to raise the question of dissolution was, that the master accommodated the servant with her cloathes, and made an advancement to her of the money. They indeed acted upon the despair of the servant being able to perform her service while she continued sick, and it turned out so, but the one or the other might perhaps have compelled the performance of the contract. Here are the words, that the servant went away and *left* the service. *The King* v. *Christ-church* turned upon that point, and it seems to warrant us upon the narrowest construction of the statute in saying that no settlement was gained by a service so discontinued.

GROSE, J. observed that it was certainly difficult to to reconcile all the cases upon the subject, but taking the case according to the rule which was adopted by Lord Kenyon, the court could not, on the words of the

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statute, say that the pauper *continued and abided* in his service during the whole of the year. He was therefore of the same opinion with his Lordship.

LAWRENCE, J. "It has been decided in *the King* v. *Thisleton*,* that if the master has once parted with his control over the servant, then no settlement is gained, for there is an end of the relation of master and servant during the year. In *the King* v. *Christ-church*, Wilmot, J. considered the servants, being at Mrs. Lemonier's, or in the hospital as just the same as being kept in her master's house under his own roof; but here he actually *left* the *service*, and went down to the Lincoln hospital, and never returned into his master's service, and the same conclusion cannot be drawn."

LE BLANC, J. "However we must lament that the statute has ever been departed from, when cases occur which fall within the terms of the cases decided, we must adhere to them. This case does not so fall within the decisions. I do not found my opinion upon the circumstance of its being stated that the pauper left his master's service, though that would be sufficient; but it appears here that the parties agreed to put an end to the service. Sickness indeed does not put an end to it on the part of the servant, neither does it authorize the master to turn him away; yet, if for the purpose of going to his own friends or from any other motive of convenience, he goes away and does not return, and never has an intention of returning, that is a dissolution of the contract. The payment of the whole year's wages is a circumstance indifferent in the case, and though neither can, on account of sickness, dissolve the contract, yet it certainly may be made the cause of *both* dissolving the contract, if mutually agreed upon between them, which seems to be the case here.

ORDER OF REMOVAL AFFIRMED.

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* 6 Term Rep. 185.

1803. THE KING *versus* the Inhabitants of HOOE. *Same Day.*

A PAUPER hired a tenement of 11*l. a year value, and resided upon it for a year and upwards; before he hired it, he agreed with another person to be his under-tenant of a part at* 5*l. per annum, who became* guarantee *to the landlord for the whole of the rent: Held, that a settlement was gained by the pauper; notwithstanding the sessions found that* CREDIT *was only given to the pauper for* 6*l. per annum, and he had continued to receive relief from his former parish for six months.*

THE KING *versus* the Inhabitants of HOOE.

THIS was an appeal at the *quarter sessions* for the county of *Sussex*, July 15, 1803, against an order of two justices, for the removal of *John Akehurst*, his wife and children, from the parish of *Pevensey*, in that county, to the parish of *Hooe*.

The court confirmed the order, subject to the opinion of the court of King's Bench, upon the following case:

The pauper was originally settled in *Hooe*; and immediately previous to the hiring in question of the premises hereinafter mentioned, occupied a house in *Hooe*, belonging to *John Pococke*, at the rent of 4*l*., of which the parish, from the inability of the pauper, paid 40*s*. At Lady Day, 1803, the pauper took of *Pococke* a house in *Pevensey*, with certain rights of common annexed to it, at the rent of 11*l. per annum*; but what the extent of those rights were, the pauper, when examined, did not happen to know. *Pococke* being at that time overseer of the poor for the parish of *Hooe*, the pauper took possession of *Pococke*'s house at *Pevensey*, a few days after Lady Day, and continued to occupy it till the time of *the removal*. The period of Lady Day, 1801, was a time of scarcity; and the parish of *Hooe* continued to give relief to the pauper for six months after he went to reside at *Pevensey*. The pauper was unable to purchase cattle to turn out on the common. The cause of the pauper's taking *Pococke*'s house was, that he had an opportunity

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of engaging in a contract with one *Porter*, in carrying chalk coastwise, by which he earned above 60l. for himself, a man, and a boy, employed in navigating the vessel, in the course of a year. Previous to the pauper's contracting with *Pococke*, *Porter* had agreed with the pauper to take part of the premises under him, and pay him for it 5l. *per annum*. *Porter* was desirous of having the pauper in his employ, and was the first person who made application to *Pococke* for his house. Previous to its being let, *Pococke* said he would not let the house, except *Porter* would guarantee the rent. *Porter* therefore consented to guarantee to *Pococke* the payment of the pauper's rent; but at the time the pauper made his contract with *Pococke*, *Porter* was not present, and *Pococke* then said expressly, that he made this agreement with the pauper only, and considered none but him as his tenant. *The pauper paid the whole of the rent for the first year, by instalments at different times*, and part of the rent for the year following, the rest remaining unpaid. It appeared that the pauper would not have hired the premises at *Pevensey*, unless *Porter* agreed to take part of them under him, at the rent above-mentioned; and *Pococke* did not consider the pauper of sufficient credit and ability to hire the premises in question, if *Porter* had not guaranteed the payment of the rent. *The court* (of quarter sessions) *were distinctly of opinion, that none of the parties to the contract acted with any fraudulent intention*; but that, upon the whole of the facts, credit was given by the landlord to the *pauper* for 6l. only of the rent, and that for the residue thereof the credit was given solely to the said *Porter*.

ERSKINE and NEWLAND, *for the respondents*, cited *the King* v. *Fillongley*,* as one which would be relied upon by the other side, and therefore endeavoured to draw several distinctions between them. They said, "the

* 1 Term Rep. 458, and 2 *Const.* 121.

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statute of 13 and 14 *Car.* II. c. 12, did not apply to this case, so as to give the party a settlement, by residing in the house at *Pevensey*. Though the whole rent was 11l., this was not an intire tenement of 10l. a year and upwards, because the landlord required a *guarantee* from another person besides the pauper. But the intent of the statute was, that no one should come into a parish to settle, who could not shew himself of *ability*, by renting a tenement of 10l. a year. A person allowing another out of charity to *occupy* such a house, has indeed been held to give a settlement to charge the parish. But notwithstanding what was said by *Buller*, J. in the case of *the King* v. *Fillongley*, that the question of *inability* did not apply, yet he considers residence on a house of 10l. *per annum* as an evidence of *credit*, and a presumption that the person will not become chargeable; but that reason does not occur here, for he has only credit for 6l. *per annum*.

They also contended that the case itself was imperfect, that although it stated there was no fraudulent intention, yet it contained rather *the evidence* of facts, than the facts themselves, leaving the court of King's Bench to decide both the fact and the law; and therefore they requested it might be sent down to be amended.

[Lord ELLENBOROUGH, C. J. "The *sessions* have found one thing rather extraordinary, namely, that none of the parties acted with a fraudulent intention, and yet that one of them said one thing, and meant another."]

GARROW, COURTHORPE, and D'OYLEY, *for the appellants*. "A great part of the case may be rejected as impertinent, or even inconsistent; and yet there are some few facts stated with sufficient clearness for the court to decide upon. It is stated that the pauper took a house of *Pococke* at *Pevensey;* and though the case afterwards states the reason for his taking it, that cannot affect the settlement. The statute requires only residence on a tenement of a certain value; but it would be adding new terms to require that the tenant should be able to

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pay out of his own immediate funds. What is stated here happens every day in London. For, upon the same principle, an objection might be made to the gaining of a settlement where a person takes a large house in London for the purpose of letting lodgings, and which he would not take, unless by that means he could be enabled to pay the rent. Here there is an express exclusion of all fraud, and the rent of 11l. was the actual worth of the house. The pauper was the person who took the house, the under-tenant, *Porter*, not being present. He and the pauper afterwards made their contract apart from the landlord. The rent was not only agreed to be paid, but, in point of fact, was paid *by the pauper*."

Lord ELLENBOROUGH, C. J. "Notwithstanding all that has been done in the court below to render this case obscure, by the introduction of unnecessary circumstances, enough appears upon the face of it for us to form a judgment, without sending it back to be amended. The first thing to be done in this, as in all other cases, is to refer to the act of parliament itself, upon the terms of which the question is raised. The words are 'after any person shall come to settle (concerning which there is here no question), in any tenement under the yearly value of 10l.' Here all fraud is expressly excluded. Then what is the interest of the pauper, and what is the value of the tenement. This is clearly *above* the value of 10l., and he has the intire legal interest in the tenement, insomuch so, that it would be subject to common law executions in his hands. However, it is stated that the landlord, *Pococke*, upon being applied to by *Porter*, said, in the absence of the pauper, that he should not let it to him, unless he could have security; but when a demise is made to the pauper only, shall it be said that he has not an interest in the thing demised, because he has given security. Is he not still the tenant? It is true, that the having a security may be an inducement to the landlord to let the tenement; but still it is a letting to the pauper, just the same as when money is advanced upon a bill of exchange, the name of an indorser of credit

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may induce me to discount it; but it is, notwithstanding, an advancement of money, and a credit given by me to the holder, who transfers it immediately to me. Still less is there any reason to say this is not a letting to the pauper, because the person who is to answer as *guarantee* for him, has a part of the tenement underlet to him, in order to enable him to repay himself, or lessen his risk. It appears then, notwithstanding these circumstances, that this is a person having a tenement of 11l. a year, he is therefore not removable under the act; to say otherwise, I must deprive the act of its fair meaning."

GROSE, J. "It does not seem to me that it is necessary to send this case down to be amended, or that there is any difficulty in it. The question comes shortly to this, Whether, upon removal to *Pevensey*, the pauper *came to settle* upon a tenement of the yearly value of more than 10l? The case of *the King* v. *Fillongley* is decisive upon this point; and I am satisfied with the words of Chief Justice *Parker*, cited in that case by *Buller*, J. 'If a man hire a house at a small rent, and pay a fine, yet if the house is worth 10l. *per annum*, it makes a settlement; for the settlement depends on the *value* of the tenement, and not on the rent. The pauper took possession of the house, and lived in it unremovable 40 days; and if in this case it were necessary that he should be able to pay for it, the fact is, that he actually does pay for it: but that is not necessary. Supposing a pauper, coming out of a poor-house, were immediately afterwards to get a furnished house, by the letting out of which he may get money, he takes a house of 100l. *per annum*, and gets a friend to become security for him, that would be sufficient for him to gain a settlement. For the true question is, has the person *credit* to rent the house? and it is immaterial whether there are other persons connected with him who support that credit, by enabling him to pay his way."

LAWRENCE, J. "It does not seem to be argued, that the pauper was not in possession of a tenement beyond the yearly value of 10l.; but it is contended, that we

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must suppose some facts to exist in the case that will deprive the pauper of the settlement gained by that tenancy under the statute, because it is stated, in the end of the case, that the credit was given for part of the rent to *Porter*, who was the under-tenant to the pauper. The statute gives the power of removal only in cases where any person comes to settle in any tenement under the yearly value of 10l.; but here he came to settle on a tenement of the value of more than that sum, and it was demised to the pauper. It is no matter what induced the landlord to let the tenement to him."

LE BLANC, J. "The whole argument has been upon what the case has stated, with respect to the credit given on account of *Porter*. At the first, I thought the latter parts of the case had thrown an ambiguity over the whole; but the sessions have stated clearly, that the tenement was let to the pauper. It is added, that *Porter* was to be *guarantee*, and that he was to take part of the tenement at 5l. a year. It seems that this circumstance has led the court of sessions into the error; for it is from this that they drew the conclusion, that credit was only given to the pauper for 6l. a year, although the whole was let to him. They considered this to have relieved him, if I may so say, from paying more than 6l. a year; but referring to the statute, it seems perfectly immaterial by what means he is enabled to pay the rent, or from what sources he looks to be supplied with means and ability, if he actually rents a tenement of more than 10l. a year. The sessions have therefore done wrong in considering this as not a renting to the amount of more than 10l."

RULE ABSOLUTE.—ORDER QUASHED.

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BUTTERFIELD *(qui tam) versus* WINDLE *and Another.*
Friday, Nov. 25.

IN an action on the 3 Geo. II. *c.* 26, *s.* 4, *imposing a penalty on persons selling one sort of coals for another, a contract was proved in Middlesex for the sale of* Wall's End *coals, without specifying a particular parcel, and the defendants afterwards* fraudulently *delivered* other *coals to the vendee in* London: *Held, that the sale not being complete until delivery, the* venue *should be in* London.

In the same case the coals delivered were deficient in quantity, there not being three lawful bushels, of the bushel of 12 Anne, *put into each sack: Held, that under the* 13*th section of the statute* 3 Geo. II. *c.* 26, *the true quantity should have been put into the sacks in* Middlesex, *where they were filled; and this being a* local *omission of a local duty, the* venue *in a count for this offence should be laid in* Middlesex.

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THIS was an action for penalties for several offences against the acts respecting the sale of coals. The declaration contained, amongst others, two counts, formed on the stat 3 *Geo.* II. c. 26, namely, the first count on the fourth section, and the fourth count on the 13th section of that statute. These were in substance as follows:

For that whereas the said *William Windle* and *Charles Windle*, after the 24th day of June, in the year of our Lord 1730, and within the space of six calendar months next before the commencement of this suit, to wit, on the 19th day of October, in the year of our Lord 1802, in the parish of *St. Dunstan in the West*, within the city of *London*, they, the said *William Windle* and *Charles Windle*, being persons dealing in coals, did knowingly sell to *Thomas Wood* a certain quantity, to wit, five chaldrons of coals, pool measure, as and for a sort of coals which they really were not; that is to say, as and for a sort of coals called the *best Wall's End coals*, when in truth and in fact the said coals so sold by the said *William Windle*, and *Charles* as aforesaid, were not really the said sort of coals, called the *best Wall's End coals*, but were coals of another and different sort, description, and quality, which they, the said *William Windle* and *Charles*

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Windle, at the said time, when they so sold the said coals to the said *Thomas Wood* in the parish of *St. Dunstan in the West* aforesaid, in the city of London aforesaid, well knew; contrary to the form of the statute in such case made and provided, and thereby, &c.

And also for that, &c. they the said *William Windle* and *Charles Windle*, then being dealers in and sellers of coals by the chaldrons, or lesser quantity, within ten miles round the cities of London and Westminster aforesaid, did sell by the chaldron to the said *Thomas Wood* a certain other quantity of coals, as and for five chaldron of coals, pool measure; and afterwards, to wit, on the day and year last aforesaid, in the parish aforesaid, in the city aforesaid, did carry coals to the said *Thomas Wood*, the buyer thereof, as and for the said five chaldron of coals, pool measure, so sold, and being as last aforesaid, in and from divers, to wit, seventy coal sacks, then and there used by the said *William Windle* and *Charles Windle* for that purpose, and delivered the said coals to the said *Thomas Wood* as and for five chaldron of coals, pool measure as aforesaid: Nevertheless, the said *William Windle* and *Charles Windle*, not regarding the statute in that case made and provided, did not nor would in each and every, or any of the said sacks so used by them for that purpose as aforesaid, put, or cause to be put, three bushels of the said last-mentioned coals, so sold, carried, and delivered to the said *Thomas Wood* as aforesaid, justly measured with a lawful bushel, to wit, such a bushel as is described in and by the said act of parliament, made in the said 12th year of the reign of her said late majesty queen *Anne*, intituled as aforesaid, but then and there wholly omitted so to do contrary to the form of the statute in such case made and provided, &c.

At the trial before Lord ELLENBOROUGH, C. J. in the sittings after Trinity term, in London, the fraud was proved; but it appeared that the wharf of the defendants was situated in *Middlesex*, and there the coals were ordered and agreed for, and afterwards were there put into the sacks; but the purchaser *Wood* resided in

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the parish of *St. Dunstan in the West in London,* and there the coals were delivered. Upon this an objection was taken at the trial, that the offence was not proved in *London,* where the venue was laid, which being overruled, a motion for a new trial was made, and a rule to shew cause obtained, leave being given for that purpose at the trial *.

GIBBS and MARRYAT, *for the plaintiff. Wood,* the purchaser of the coals, went to the wharf, which was in Middlesex, and ordered a quantity of *Wall's End* coals, generally, without having seen and bargained for any *specific* parcel of coals; the defendants sent him a quantity of *other* coals; the sale therefore is not complete in *Middlesex,* for up to the time of the delivery, it was open to the defendants to have sent him coals of the description really ordered. The offence could not therefore have been committed elsewhere than in *London,* where the delivery was; for the *gist* of the offence is the *sale,* the words of the statute being, "every person who shall knowingly sell, &c. shall forfeit 500l.;" † and the 1st count is framed accordingly.

The same argument applies to the 4th count; for as this declaration is formed, the offence in that count also consists in the *selling* without measuring. That offence also is not consummate until the delivery, and being an offence, by the omission of an act which ought to have been done, there is no evidence of its being complete at any other place than where the delivery and sale is.

ERSKINE *and* HARRISON, W., *for the defendants,* contended, that the statute 3 *Geo.* II. c. 26. applied only to wholesale dealers, and stood perfectly unconnected with the other acts which regulate the measurement in

* There was another objection taken, which the court said must be in arrest of judgment, namely, that the bushel of 12 *Anne* was repealed by 7 *Geo.* III. c. 23. This objection has not been argued.

† 3 *Geo.* II. c. 26. s. 4.

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the retail trade, for, as appears from the preamble of the 4th section, it was to "dissolve combinations of *coal owners*, to advance the price of coals."

"Although when the bargain is made for the coals, no specific quantity is exhibited to the purchaser, and bought by him, yet the offence within the meaning of the act is complete before the delivery. For even if they are shewn as *Wall's End* coals, not being so, the act of shewing them could only be evidence of an intention of selling them fraudulently for what they are not; and it is the same thing, if that intention is evidenced as here, by delivery which follows afterwards. To admit of a *locus penitentiæ* between the bargain and the delivery would give an opportunity to evade the statute in all cases; for when the coals arrived at the purchaser's, it would be easy to see whether he had detected the fraud and before a sack was unloaded, the driver would order the cargo back, and so screen his master from the penalty. As to the fourth count, the gist of the offence there is, the not measuring; and though in ordinary cases measuring may be done any where, yet the safer construction of this clause would be, that the coals should be measured at the wharf where the dealer is directed to keep his bushel."

Lord ELLENBOROUGH, C.J. "This case on the two different counts is presented to us in very distinct and different views. As to the first, the offence consisting in the *sale*, which in this case, for want of a previous specification of the individual thing to be purchased, is not complete until delivery, there is no offence here complete but in London, where the *sale and delivery* was complete. But as to the *measurement*, I cannot help thinking that the offence was perfected in Middlesex. Without examining into the other statutes *, which by their number tend much to embarrass the subject, I think the measurement

* Several other statutes, *in pari materiâ*, were cited in the argument, which is here stated very shortly.

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should be performed when the coals are put into the sacks to be delivered. This was done at the wharf, and the statute, in this fourth section, requires, that the dealers in coals by the chaldron shall *constantly keep and use* at their respective wharfs 'a certain bushel, *with which bushel* they shall justly measure, and shall *put* three bushels of coals, *so justly* measured, into each sack before described.' Then it states, if they shall not fill their coal sacks from such bushel, or shall otherwise offend, they shall for every offence forfeit 50l. Now, how are they to fill from such a bushel but at the place where they are constantly to *keep and use* their bushel? This, therefore, I consider as an omission of a local act, for though omission is a negative term, yet it may, as in this instance, have a locality in its application. The whole context shews, that every part of what is required to be done by the dealer in the measurement, should be done at the wharf. The whole of the clause, though it contains several offences, shews that they are to be construed as being *in pari materia*. And the latter part of it makes it still more clear, for it provides, that "if any servant of such dealer shall, from and after the first day of August, 1730, *fill* such coals into sacks without *first duly measuring the same* by such bushel, such servant shall for every such offence be committed to the house of correction. I think, therefore, it is required in both cases, as well with respect to the master as the servant, that they shall measure *where* they *fill* the sacks, and that it must be considered as a *local* omission of a *local* duty *.

* 3 *Geo.* II. c. 26. s. 13. "From and after the 1st day of August, 1730, all dealers in and sellers of coals by the chaldron, or lesser quantity, within the cities of London and Westminster, or within ten miles round the same, *shall constantly keep and use* at their respective wharfs, warehouses, and other places for the sale of their coals, a lawful bushel, such as is described in and by an act made in the 12th year of the reign of her late majesty queen *Anne*, intituled, &c.; *with which bushel* all such dealers in and sellers of coals shall justly measure, *or cause*

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GROSE, J. of the same opinion. "As to the fourth count, I cannot express my construction of it better than by using his lordship's terms, that it is a local omission of a local duty. There are several things required to be done, such as justly measuring, putting three bushels into each sack, and the like. Every one of these acts must be done at a certain place where the coals are for sale."

LAWRENCE, J. "The verdict on the first count turns upon the question, whether the *sale* is complete in any other place than where the venue is laid. Now the sale here was complete only at the place of delivery; for it was never intended by this statute to make the defendant guilty for a bare intent to commit a fraud in the sale, and many of the arguments put at the bar have gone upon that ground. Here, as the offence is the sale, it could only be complete by delivery, because the term *sale* implies that the property must pass to the vendee, which could not be in this case till after the delivery. There is here nothing but a contract of sale. To complete the sale of goods the thing must be at least clearly ascertained. Here, though *Wood* might have brought an action against the dealers for the *non-delivery* of coals, he could not have brought an action of *trover*, in which the property should be considered as having actually passed to him. There is a passage in the *Digest (de pe-*

all the coals they shall so sell by the chaldron or lesser quantity to be measured, and shall put three bushels of coals so justly measured into each sack before described; which said sacks they shall use and no other for the carriage of such coals to the buyers thereof; and all such dealers in and sellers of coals within the said limits, who from and after the 1st day of August, 1730, shall not constantly keep and use such bushels, or shall otherwise offend against the true intent and meaning of this act, shall for every such offence forfeit and pay the sum of 50l.; and if any servant or servants of such dealer or dealers in coals shall, from and after the 1st day of August, 1730, fill such coals into sacks *without first duly measuring* the same by such bushel, such servant or servants shall for every such offence be committed to the house of correction, there to be kept to hard labour for any time not exceeding thirty days nor less than fourteen."

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riculo rei venditæ), lib. 18. tit. 8. *si id quod venierit appareat quid quale, quantum sit et purè venit perfecta est emptio.* Therefore, unless the *specific thing* is clearly ascertained and identified between the parties the sale is not complete to vest the property in the vendee until the delivery. Upon the fourth count I agree with my brethren, that the venue is wrong laid. Here the sale is no part of the offence, but it consists in the measurement not being by the bushel, or putting the proper quantity into each sack; that act ought to have been done where the sacks were filled, and the omission was in *Middlesex,* and therefore the venue ought to have been laid there."

LE BLANC, J. expressed himself generally of the same opinion, and observed, "that although till delivered in London, the buyer had no evidence that the coals were not measured, and although the finding them deficient in measure after the delivery would be evidence of their not being duly measured, yet it would be only evidence of the omitting to measure them in Middlesex."

THE VERDICT was therefore ordered to be entered for the defendant on the fourth count, and for the plaintiff on the first.

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ON an insurance, by a British underwriter, during peace, against capture, &c. in general terms on a foreign ship, which is afterwards captured by one of his majesty's ships of war, upon hostilities breaking out between the two countries, the assured cannot recover for the loss even after peace is restored. The general terms, arrests *of princes, must be understood with an exception of the nation to which the underwriter belongs.*

On a policy at 25 guineas per cent. to return 8l. per cent. if the ship sailed from Cadiz with convoy for England, and 2l. per cent. more for convoy from England to Flushing, or 10l. per cent. if with convoy for the voyage, and arrived, no part of the premium is returnable in case the ship be lost; for the words, and arrived, *mean arrived at the* ultimate terminus *of the voyage.*

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IN this case the plaintiff declared upon a policy of insurance, he the said (plaintiff) then and there, being the person residing in Great Britain, who received the

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order for and effected the said writing, or policy of insurance, as well in his own name as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, "whereby *he* did make assurance, and cause himself and them, and every of them, to be insured, lost or not lost, at and from *Lisbon* to *Cadiz*, and at and from *thence* to *Flushing*, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, &c. of and in the good ship or vessel, called *The Princess Louisa*, whereof, &c. beginning the adventure upon the said goods and merchandizes, from the loading thereof on board the said ship *at Lisbon and Cadiz*, upon the said ship, &c. and so should continue and endure during the abode there upon the said ship, &c.; and further, until the said ship, with all her ordnance, tackle, apparel, &c. and goods and merchandizes whatsoever should be arrived at *Flushing*, upon the said ship, &c. until she had moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes, until the same should be there discharged and safely landed; and it should be lawful for the said ship, &c. in that voyage to proceed and sail to, and touch and stay at any ports or places whatsoever, &c. The ship, goods, &c. valued at ——l." Touching the adventure and perils, they were in the usual form, viz. of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettizons, letters of mart and countermart, *surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, &c.* as in the usual form, at the rate of 25 *guineas* per cent. *to return* 8*l.* per cent. *if the said ship or vessel sailed from Cadiz with convoy for England, and* 2*l.* per cent. *more for convoy from England to Flushing, or* 10*l.* per cent. *if with convoy for the voyage, and arrived:* With a memorandum, declaring the insurance to be on the said ship valued at 1000l. which policy the defendant subscribed by one *F. Secretan*, his agent, for 100l. After the statement of the policy and subscription thereto as above, the declaration contained

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the following averment: "*And the said plaintiff in fact says, that the said ship or vessel was not, at the time of the making, effecting, or subscribing the said writing, or policy of insurance, nor of the happening of the loss hereafter mentioned, the property of, or belongs to our said lord the king, or any of his subjects.*" It then stated, that the ship, on the 11th of September, 1794, sailed in safety from *Lisbon* on her said intended voyage, and afterwards, on the 27th of September, 1794, arrived in safety at *Cadiz;* and afterwards, to wit, on the same day and year last aforesaid departed in safety from Cadiz aforesaid, with and under convoy for England, and arrived; and that afterwards and during the said intended voyage, and before the same could be completed, to wit, on the 29th of January, 1795, the said ship or vessel was arrested, taken, and detained as prize by our lord the present king, &c. And so the plaintiff demanded as for a total loss, with a return of 8l. *per cent.* premium, the ship having sailed from Cadiz with convoy for England, and arrived. The declaration contained also the common money counts.

The defendant pleaded a special *demurrer* as to the first count of the above declaration, and stated the following causes: "For that it is not alleged, nor does it appear in and by the said first count of the said declaration, that the said plaintiff, or any person on whose behalf or for whose account the said insurance in that count mentioned was made, had any interest in the said ship, nor what person was interested therein; and also for that it is not alleged, nor does it appear in or by the said first count of the said declaration, that the said ship, at the time of her sailing and departing from Lisbon, *or at the beginning of the adventure,* insured by the said writing or policies of insurance, was not the property of or belonging to our said lord the king, or of any of his subjects; and for that the said first count of the said declaration is in other respects informal, &c."

This demurrer was argued in *Trinity term* last by GILES *for the defendant,* and HOLROYD *for the plaintiff;*

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and the argument turned principally upon three points: first, whether the plaintiff could recover upon a loss by British capture: secondly, whether the averment that the ship was not, at the time of the making of the policy, nor at the happening of the loss, the property of his majesty, or any of his subjects, was sufficient to take the insurance out of the effect of the statute 19 *Geo.* II. c. 37. against wagering policies*: and thirdly, whether any and what return of premium could be claimed in case the policy was void.

On the first point, *Furtado* v. *Rogers*† was relied upon on behalf of the defendant; and it was admitted by the plaintiff's counsel, that if the decision of the court of Common Pleas in that case were conclusive upon this court, it had decided the question; at the same time it was urged, that this was not an insurance against British capture in particular, and that this could not be void unless all insurances of neutral property are held to be void in case a war breaks out in the interval between the insurance and the loss, and continues at the time of the loss.

2dly. With respect to the averment of the ship being foreign property, it was contended that it ought to be co-extensive with the whole time insured for, but that here there was an interval between the first insurance and the loss, during which, for any thing that appeared, the ship might have been the property of his majesty or a British subject. To which it was answered, that the stat. 19 *Geo.* II. c. 37. did not make the policy wholly void; that it might therefore be good, for that part of the time insured for, during which

* In *Nantes* v *Thompson*, 2 *East*'s Term Rep. 386. The averment was more extensive, viz. "that the said ship Hoop was not at the time of the effecting of the policy, nor of the happening of the loss hereafter mentioned, *nor at any other time*, the property of, or belonging to, our lord the king, or any of his subjects.

† *Bos.* and *Pull.* 3. 191.

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the interest in the ship was in a foreigner, although at a period either before or after, it was in a British subject, and also that it was not necessary to make the averment at all, for where a statute has made an alteration in the common law, the statement in a declaration is the same as before the statute; and in 2 *Salkeld*, 519, it is so laid down with respect to a collateral promise*, which must be in writing under the statute of frauds; and that therefore, as the plaintiff does not found his *action* or his *right* upon the statute, it is not necessary for him to bring it within the statute in his declaration, but the statute is only matter of defence which should come on the other side.

The 3d question being entirely upon the construction of the words of the policy, the contention was, whether the words, "*and arrived*" were to be applied to each point in the voyage, for which a convoy might be taken, or only related to an arrival at the *ultimate terminus ad quem*, namely, the arrival at Flushing. And upon this point *the court* expressed a decided opinion on the argument, that "the obvious sense of the policy was, that if the ship sailed from either of the places named, with a convoy, and arrived, that is to say, completed her whole voyage, there was to be a proportionate return of premium for the part of the voyage so protected by the convoy, but not that there should be a return of premium where there was a payment of the loss also. But there being other cases upon the principal question, the court took time to consider the case, and on this day the opinion of the court was delivered in effect as follows, by

Lord ELLENBOROUGH, C. J. *after stating the case*, "The averment, that 'the ship was not, at the time of the making, effecting, or subscribing the said writing or policy of insurance, nor of the happening of the loss here-

* *Raymond*, 450; *Carr* v. *Barber*; Sir *T. Jones*, p. 158; and *Williams* v. *Leper*, 3 *Burr.* 1890, where *Yates*, J. says, "it is not necessary to state in their declaration that the promise is in writing," were cited.

inafter mentioned, the property of or belonging to our said lord the king, or any of his subjects,' is introduced, in order to take the case out of the statute of 19 *Geo.* II. c. 37. And it appears that, at the time of the insurance, the ship was the property of alien friends; that she sailed from Lisbon to *Cadiz*, and from thence with convoy to *England*, where she arrived in safety; and upon a war breaking out between this country and *Holland*, she was taken and detained as prize to his majesty. To this count of the declaration there is a demurrer, and two questions arise upon it: first, Whether there is to be a return of premium on account of the *departure* from *Cadiz* with convoy, the ship having arrived at *England*, but not having arrived in safety at *Flushing*, which was her ultimate port of destination? We are of opinion that there ought not to be a return of premium, because the words "*and arrived*," constitute one general condition, which overrides the whole of the previous sentence, and governs equally all the provisions of it for each of the subdivisions of the voyage; that is to say, beginning in the inverted order, and taking the last part first, if the ship sail with convoy *for the voyage, and arrive*, to return 10*l.* per cent. premium; if with convoy from *England* to *Flushing, and arrive*, to return 2*l.*; if the ship sail with convoy from *Cadiz* to *England*, and arrive, to return 8*l.* per cent. For it is impossible to say, that the arrival at the separate parts of the voyage should render the underwriter liable to a return of premium, independently of the same effect which those words have in his favour with respect to the ultimate arrival; and that he should have to pay on a total loss, and yet have to return the premium.

"A second question is, Whether the allegation respecting the property of the assured in the ship, sets forth sufficiently that it was, under such circumstances, foreign, as to render it a valid insurance within the stat. 19 *Geo.* II. c. 37? And next, supposing that allegation is not sufficient, Whether it ought not to be rejected as surplusage? This depends upon, Whether any such allegation at all is necessary? And, Whether it is not necessary for the de-

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fendants, in order to rebut the claim of the plaintiff, to shew that the insurance was made upon property which fell within the restrictions of that statute? And this has been argued to be so by analogy to the statute of frauds, which has made certain requisites necessary in leases for more than three years, and in promises for the debts of third persons, or of testators by their administrators, and which requisites, however, it is not necessary for the plaintiff, at first, to shew, have been complied with, it being sufficient if it be stated in the declaration in the same form as it would have been before that statute. In other words, Whether this statute, 19 *Geo.* II. c. 37, makes any other mode of declaring necessary than was so before the making of that statute? And, lastly, a third question arises, Whether a policy of insurance of a foreign ship by a British underwriter be a valid instrument, so as to charge such underwriter, in the event of a lawful capture of such ship by one of his majesty's ships of war? And inasmuch as our opinion is in favour of the defendant on this latter objection, it is unnecessary to consider such other objections as have been raised, which relate to the sufficiency of the averments to take this case out of the statute, with respect to wagering policies. It is said, indeed, that this is not an insurance *expressly* against British capture, but that it is only an insurance against *capture generally*, made at a time when the ship was not liable to be taken as prize to his majesty, although, a war afterwards breaking out, it was lawfully taken as prize by a British ship of war. In effect it amounts to this question, Whether an insurance against *capture generally* can be legally carried into effect, so as to operate to insure the persons for whom it is made, against a capture by his majesty's ships, and so as to secure the property of an enemy from suffering by the event of a war with this country? And, upon due consideration, we are of opinion, that this last objection is well founded, and that no action can be maintained upon a policy so circumstanced. A policy against British captures, *eo nomine*, would be clearly illegal, as directly

against the interest of the state, and tending to defeat the necessary operations of the war, which the state is, at the time, carrying on, at least to the extent of the indemnity created by the insurance. And if an insurance against British capture in terms would be void, then an insurance in general terms, which would indirectly include the same thing, must, on the like grounds of obvious policy, be void also. In this there is a great analogy to the case of illegal adventures, in contravention of the revenue laws. For if an enemy's property should be covered under the general term *capture of princes*, as being every way virtually included in the words of the policy, the effect of which we have expressed already, so may other illegal adventures be included in the terms *restraints* of princes and people. But yet policies are always construed with an exception against all such illegal adventures: and upon grounds of the best national policy, all policies of insurance, affecting the question of capture, ought to be so construed in an English court of justice, that the designs of the government may not be countervailed by the private interest of the subject. Whatsoever opinions have been urged to the contrary, neither those opinions, nor the authority and zeal with which they have been pressed, have gone the length of producing one judicial authority on the subject, nor was it ever argued judicially. The practice indeed, if it has obtained, having been countenanced by opinions of great authority, has gone upon the mutual good faith of the parties, and the objection against it has never been taken. But if it had been taken, it cannot be said but that those even who thought it *politic* to allow the practice of it, might have held it not strictly lawful in itself; and when taken, and fully considered, as it was in a recent case of *Furtado* and *Rogers*, it was decided, that the insurance of the property of an enemy is illegal. On the general grounds of policy, I fully and entirely agree with the judgment in that case. The able manner in which Lord ALVANLEY has there laid down those principles of policy, render it unnecessary for me to make any

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further comments upon that subject. I will now take notice of one point, which was made in the case of *Gamba* v. *Le Mesurier*,* and arises upon the statute 34 *Geo.* III. c. 79, sec. 12, which enacts, that any persons who, before the 8th of May, 1793, had effected an insurance on any ship or effects belonging to persons resident in any of the dominions of France, or within any territory which, on the 1st of January, 1794, was, or during the war should, be under the government of the persons exercising, or who should exercise the powers of government in France, for the benefit of such persons respectively, to apply to the commissioners (appointed by that act) to direct the payment of any money due by virtue of such insurance, in such manner as the said commissioners should direct, which the said commissioners are thereby authorised to do. And that they may recover the same, *notwithstanding any thing* in the said recited act of that present session (34 *Geo.* III. c. 9.) to the contrary; and that it should not be pleaded to any such action, that the person or persons for whose benefit any such insurance was made, was, or were an alien, enemy, or enemies; provided always, that all money, which should be recovered by means of such action, should, in all respects, be subject to the provisions contained in the said recited act, 34 *Geo.* III. c. 9; and in *that* act (34 *Geo.* III. c. 79). And it has been contended, that as that statute enabled persons to recover upon insurances of enemies' property made even during the war, so the plaintiff in this case having a licence from the commissioners, may be at liberty to recover on this insurance at least, which was made before the war. But we are of opinion, that that clause was intended only to remedy the recent personal objections to the recovering upon such policies of insurance which had been enacted during that session; and that the legislator having expressly referred to the recent act, must have considered no other objects as within the

* Vide the next case.

provisions of that clause. But it is certain, that this being an insurance in effect against British capture, is not within that act, unless the taking away of the *bar* of pleading alien enemy is to be considered as enabling the plaintiff to recover. But that too was to apply to the particular cases there alluded to, with respect to the provisions of a recent statute. At any rate we are of opinion, that if it was intended to give that a general application, yet it is safer to determine that the legislature has *defectively* provided for the removal of the obstacles against the plaintiff in this case, and that it is *casus omissus*, than to adopt a construction, which should proceed upon a presumption, that the legislature meant to alter the great and leading principles of the law, to enable a plaintiff to recover in such a case as this, evidently against the true policy and interest of the state."

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JUDGMENT FOR THE DEFENDANT.

GAMBA and Another *versus* LE MESURIER.—*Same Day.*

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INSURANCE on a French ship in time of peace; war is declared, and she is captured by a British force; the agents for the assured obtain the royal licence to receive the money for the loss from the underwriters, and upon the arrival of peace an action is commenced upon the policy under their authority: Held, not maintainable.

THIS was an action upon a policy of insurance, dated the 18th day of September, 1792, upon the ship called the *Æole*, and upon any kind of goods and merchandises on board, at and from *St. Domingo* to *Dunkirk*, to recover a loss by capture. The cause was tried before the right honourable Lord ELLENBOROUGH, C. J. at the sittings in *London*, after Hilary term, 1803, when the jury found a verdict for the plaintiffs—damages 200l., and costs 40s., subject to the opinion of the court, upon the following case:

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The plaintiffs, upon the 18th day of September, 1792, caused the insurances in question to be made on the ship *Æole*, and on any kind of goods and merchandise on board. The defendants subscribed the same for 200l.; which subscription was on the goods and merchandises. On the 16th day of October, 1792, the ship began to take her loading on board. From the time of the insurance, until the loss hereinafter mentioned, the plaintiffs were owners of the ship, and interested in the cargo beyond the amount of the sum insured. At the time the policy was effected, and from thence until the action was commenced, the plaintiffs were French subjects, merchants and partners, resident at *Dunkirk* in *France*, which country, when the policy was effected, was in amity with this kingdom, and remained so until the month of February, 1793, at which time hostilities broke out between this kingdom and *France*. The ship *Æole*, with her cargo on board, remained in good safety at *St. Domingo*, until the 29th day of September, 1793, when the ship and her cargo were captured by three British frigates, and were afterwards regularly condemned in the court of Admiralty, as prize to the British force. At the time this action was commenced, this country was again in amity with *France*. On the 3d day of May, 1795, his majesty granted a licence to Messrs. *Bourdieu*, authorising them to receive from the underwriters on this policy the money for which they had subscribed; and this action was brought under the direction of Messrs. *Bourdieu*, the plaintiffs' agents.

The question for the opinion of the court is, Whether the plaintiffs are intitled to recover in this action? If the court shall be of opinion that they are, a verdict is to be entered for the plaintiffs; but if the court shall be of opinion that they are not intitled to recover, then a nonsuit is to be entered. Either party is at liberty to turn this case into a special verdict.

This case was ably argued by C. WARREN, *for the plaintiffs*; and BEST, Serjeant, *for the defendants*.

The course of argument was, in general, very similar

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to that which was adopted in the other late cases, where the insurance of the property of an enemy came in question; and in addition to the argument on the statutes, noticed in the judgment in the last case, it was very strongly pressed, on behalf of the plaintiffs, that in opposition to the case of *Furtado* and *Rogers*,* against which it was competent then to argue, as if it were before the court on error, the whole current of authorities, for upwards of, at least, 60 years, was in favour of such insurances. That although the objection was never taken to their being lawful, when such actions were formerly brought, yet the question passing *sub silentio*, was an admission of their legality; and that the provisions of 34 *Geo.* III. c. 9 and 39, if they are to operate farther than to take away the right of British subjects to insure the property of an enemy during war, and also to prevent the assured from recovering during war, even upon an insurance made in time of peace, are a tacit admission of the legality of such an insurance previous to the statutes.† And the opinions of Lord *Mansfield* and Sir *Dudley Rider*, when solicitor and attorney general, delivered in the House of Commons, in favour of these insurances, were much relied upon.

As to these authorities Lord ELLENBOROUGH, C. J. made some strong observations, in delivering the judgment of the court in the last case; and BEST, Serjeant, during the argument, cited what was said by *Buller*, J. in the case of *Gilson* v. *Bell*, to shew that the opinion of Lord *Mansfield*, as a Judge, was different; and that although he approved of the policy of such insurances, he had never actually decided that they were lawful. Upon the general principle, it was urged, that a contract during peace to supply an enemy with ships,

* 3 *Bos.* and *Pull.* 191.

† The cases of actions on ransom bills were also mentioned as similar; they having been at one time encouraged by the courts of law, and afterwards prohibited by statute.

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which would be the means of assisting him in war, could only be suspended by the intervention of war; and this contract to indemnify against the loss of a ship, would likewise only be suspended in its performance, but would not be absolutely void. That the performance of it, after the war, was not liable to the same objections, on the ground of assistance to the enemy, and injury to our own government, it would apply to the performance of it during the war.

THE COURT, upon the argument, said, there could be no doubt as to the law, or policy of the case; but they would look into the statutes 34 *Geo.* III. c. 9 and 79; and this day

Lord ELLENBOROUGH, C. J. delivered the opinion of the court, in effect, as follows, after noticing that it was in the course of the argument in this case that the point on the construction of those statutes was urged. "The other grounds suggested have not induced us to change the opinion which we had formed; for it by no means follows, that because a particular act was made to prohibit ransom bills, and they were till then permitted to be enforced by an action, an action may now be maintained upon a contract detrimental to the interests of the country; for, as was argued at the bar, they were then considered to be advantageous to its interests. As to the case put by the counsel for the plaintiffs, on a contract to supply the enemy with ships or goods, which would only be suspended by the war, that would not apply to this case, unless the supply were to depend upon the losses sustained during and by the war; and if so, it would be void absolutely, and not merely suspended. For it matters not whether the loss be *indemnified* during the war, or after the war. The effect of such an indemnity is exactly the same, whether it be made immediately, or not; for it operates prospectively as an encouragement, and lessens the evils of war to the enemy."

NONSUIT ENTERED.

BRANDON *versus* CURLING.—*Same day.*

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GOODS are shipped on board an American *by a merchant in* London, *during peace, to a French merchant at* Bayonne; *before the ship quits* Gravesend *war is declared; the goods are afterwards seized as prize by the* Spanish *government, in alliance with Great Britain: Held, that an underwriter on a policy of insurance on these goods, effected before the war, and averring the interest in the* French merchant, *is not liable for the loss occurring during the war.*

All policies of insurance on foreign interests are to be understood, with a proviso, *that they shall not extend to cover any loss occurring in the course of a war between the two nations, to which the assured and insurer respectively belong.*

BRANDON *versus* CURLING.

THIS action was brought against the defendant as an underwriter, on a policy of insurance on goods in the ship *Greyhound*, warranted an *American* ship, on a voyage at and from *London* to *Bayonne*, and the loss was stated to have arisen by seizure and detention.

At the trial before Lord ELLENBOROUGH, C. J. at the sittings after Hilary term, a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:

The plaintiff being a merchant, residing in *London* in the latter end of the year 1792, received orders from the persons averred to be interested in the goods insured, resident at *Bayonne* in France, to purchase and ship for their account on commission sundry *East India* piece-goods, which he accordingly purchased for them. These goods were shipped by the *plaintiff* on board the ship in question (being a general ship) *in the port of London*, in January, 1793; and on the 4th of February, 1793, the bills of lading were signed by the captain, and on the following day were forwarded by the *plaintiff* to the consignees of the goods at *Bayonne*, for whom the same had been purchased and shipped, accompanied by in-

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voices thereof. On the 4th of February, 1793, an order of council of that date was signed, and on the 9th was published in the Gazette, which, after reciting, "that his majesty had received intelligence that some ships belonging to his subjects were detained in the French ports, ordered that no ships belonging to any of his majesty's subjects should be permitted to enter and clear out for any of the ports of France, or for the ports of any country occupied by the armies of France until further orders; and that a general embargo or stop be made of all French ships then within, or which hereafter should come into any of the ports of Great Britain, together with all persons and effects on board the said ships; but that the utmost care be taken for the preservation of the cargoes on board any of the said ships, so that no damage or embezzlement whatsoever be sustained." The *policy* was subscribed by the *defendant* on the 21st of January, 1793. On the 11th of February, 1793, the said ship sailed from *London* for *Bayonne*, the captain having first done at *London* every thing necessary by law and the practice of the Custom House to enable her to sail from *London*, with an intention of going to *Bayonne*. On the 13th of February, 1793, she arrived at *Gravesend*, and on the following day the captain received from the searcher's office there, according to the ordinary and usual course, the *cocquet*, and other papers, which are always transmitted from the Custom House in *London* to *Gravesend*, for the purpose of being there delivered to captains of ships sailing upon outward voyages, and the ship immediately afterwards sailed from *Gravesend* for *Bayonne*. The order of council, for the declaration of hostilities between *Great Britain* and *France*, was signed by his majesty's privy council on the 11th of February, 1793, and on the following day was received by the commissioners at the Custom House in *London*. The order of council, declaring hostilities against *France*, was published in the *London Gazette* on the 12th of February. In the latter end of February, the captain was under the necessity of putting into *Port Passage*, in

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Spain, and before he could prosecute his voyage to *Bayonne*, the cargo was seized by officers acting under the authority of the *king of Spain*, and afterwards condemned as prize. The ship was *American*, as warranted; and the persons interested in the cargo were *French* subjects, resident at *Bayonne*, at the time the goods were ordered, purchased, and shipped, and also at the time the ship sailed on the voyage, and at the time of the capture. *The question* for the opinion of the court was, "Whether the *plaintiff* was entitled to recover in this action; if the court should be of opinion that the *plaintiff* was entitled to recover the verdict to stand; if not, then a nonsuit to be entered?"

GILES, *for the plaintiff*, contended, "that the purchase and shipment of the goods being in time of peace, it was a lawful trading. The signing of the bills of lading, and all that was necessary to be done upon the contract between the plaintiff and his correspondent abroad, was completed on the 4th or 5th of February, at which time hostilities had not been declared. For the order of council, on the 4th of February, was only in the nature of an *embargo*, and if at that time the ship had been burnt in the river, there could have been no question as to the plaintiff's right to recover; and the policy having then attached, no subsequent act of hostility could deprive the plaintiff of his right to have his contract performed, or to be indemnified against the risks of it. Even the declaration of hostilities, which did not happen till the 12th of February, would only go to suspend the right of action on a contract in which an alien enemy was a party. The underwriter was at that time *upon the goods*, and the plaintiff could only look to him for indemnity, because, having delivered the goods to the captain under the bill of lading, he could not get them out of his possession again, and unless he is indemnified by the underwriter, he is left without remedy, upon a loss incurred by a legal shipment of goods in time of peace. If the bill of lading did transfer the property in the goods to the consignees, *in transitu*, still the plain-

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tiff may recover now in time of peace, though for a lo for which during the war he could not. The very for of the plea of alien enemy proves this." He contend also, "that the cases upon the subject did not establi more than that contracts entered into with an *enem* were illegal, but that in this case the *contract* was wi an *alien ami*, which ought to be performed."

R. CARR, *contrà*. "The material fact in this case i that the ship *sailed* after the declaration of war. Th *alone* made the transaction illegal. It is unnecessary t examine into any other date than that of the declaratio of war, which, being compared with the time of th ship's *departure*, is sufficient to establish this to be an ac of trading with an enemy, which is illegal. Whateve difficulties, therefore, might have occurred in the case had hostilities not broken out till the *voyage* had com menced, they are out of this case. The cases of *Potts* v *Bell*,* and *Bristow* v. *Towers*,† are decisive of this case When hostilities broke out the plaintiff might have ap plied for a licence from the crown to have enabled hin to have withdrawn the goods from the possession of the *captain*, and for this he had a sufficient opportunity in the interval between the 11th and 14th of February, during which time the ship was at *Gravesend*. This is a part of the port of London, and until the ships actually receive their papers there, the clearance is not complete, nor is the voyage commenced." He cited the case of the *Hoop*,‡ and other cases,§ in *Robinson*'s Admiralty Reports, to shew, that where the shipment *was legal*, yet the exportation of the goods and sailing on the voyage *was illegal*; and on the policy of permitting insurances to be made on the property of an enemy, he cited a remarkable passage from *Valin* ‖ *on insurance*, who says, observing on the practice of our nation during

* 8 Term Rep. 548.
† 6 Term Rep. 35.
‡ 1 *Rob.* 212.
§ *Rob.* 213. 210.
‖ Ordin. par. 3. 32.

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a former war: "Thus it is the *good English* pay us by their insurances for the losses which we sustain by the force of their arms."

GILES, *in reply*, again urged, that the voyage was commenced by the clearance of the ship at London, and endeavoured to shew some distinction between this and the cases in *Robinson's Reports*.

The case stood over for judgment some days, and after the judgment in the last case,

Lord ELLENBOROUGH, C. J. added, with respect to this case,—"The question is, Whether an insurance, effected in the usual terms, *under the orders of* and for a French subject by an English subject, upon goods contracted for and shipped in time of peace, be valid in the event of a loss happening during war, when the goods belong to a foreign enemy? Having in the former cases held, that the general terms of insurance against capture are to be understood as *virtually excepting* against captures by his majesty and *British* subjects, it follows, that whenever the general words of a policy extend to *any other risk whatsoever, the insurance must be construed, notwithstanding, so as not to secure the property of an enemy*, otherwise, as before explained, the general interest of the public and the interest of the individual would always be at variance. So that, where the insurance is on goods *generally*, it must be understood as implying, 'provided this insurance shall not extend to any loss happening by reason of hostility between the one country and the other.' In like manner as the terms, 'capture and detention by princes' shall not extend to cover any loss on a *contraband* adventure. The loss in this case falling within the immediate *scope* of such a proviso, which indeed might, if necessary, be extended by other instances, we direct

A NONSUIT TO BE ENTERED."

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DOE *on the Demise of* NUNN *versus* LUFKIN *and* Others. —*Friday, November* 11.

A COPYHOLDER leases for one year certain, and at the end thereof, from year to year, for thirteen years more, (in all fourteen), if the lord will give licence, and so as the same, or any part thereof, shall not become forfeited, or liable to forfeiture, *with a covenant for quiet enjoyment of the* said term; *and also, in a certain case, for the lessor to re-enter on any part, upon giving one year's notice, and making satisfaction to be settled by arbitration: The copyholder afterwards surrenders to a trustee for the* lord, *with notice of the* lease, *and a reservation of all subsisting leases: The* lord *withholds his licence, but receives quit rents, and his trustee gives notice to quit: Held, that the lease is only from year to year, and no forfeiture, the licence of the lord being a condition precedent; that the tenant being ejected, his only remedy, if any, is in equity.*

DOE *dem.* NUNN *versus* LUFKIN.

EJECTMENT for a messuage and lands, with the appurtenances in Great Bromley, in the county of Essex. The demise was laid on the 1st of October, 1802, and at the trial before HEATH, J., at the last spring assizes for *Essex*, a verdict was found for the *plaintiff*, subject to the opinion of this court, upon the following case:

The premises are holden of the manor of *Great Bromley*, in *Essex*, by copy of court-roll, at the will of the lord, according to the custom of the said manor, of which *John Hanson*, esq. is lord. On the 28th of February, 1795, *Elizabeth Hotchkin*, widow, being then tenant for life of the premises, demised the same by indenture to *John Lufkin*, deceased, to hold to him, his executors, and administrators, from the 29th of September, 1794, for and during the full end and term of one whole year, from thence next ensuing, and fully to be complete and ended; and at the end of the said term of one year, *from year to year, for and during the term of thirteen years more, (in all fourteen years), if the lord would give licence and con-*

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Doe *dem.* Nunn *versus* Lufkin.

rent, and so as the same, or any part or parcel thereof, should not become forfeited, or liable to be forfeited, at the yearly rent of 42l., payable half yearly at Lady-day and Michaelmas. In this deed was contained a clause, that in case Mrs. *Hotchkin,* or the next reversioner, should at any time during the demise, be desirous to possess all, or any part of the premises, for their own actual occupation, or for building on, and should give *Lufkin,* or his assigns, twelve months previous notice in writing of such intention, the parts specified in the notice should be surrendered and delivered up on payment to *Lufkin* of such compensation for giving them up, as two persons appointed by the parties, or their umpire, should judge a reasonable satisfaction. Mrs. *Hotchkin* further covenanted and agreed with *Lufkin,* that he, his executors and administrators, paying the above reserved yearly rent, and keeping all other covenants and agreements therein contained, should hold and enjoy the premises for and during the term aforesaid, without the disturbance of the said *Elizabeth Hotchkin,* the persons to whom the next reversion belonged, or any other person by her means, consent, or procurement. *By virtue* of this indenture *Lufkin* entered, and was possessed of the premises till August, 1801, when he died, having made his will and appointed the defendants executors, who duly proved such will, and have since continued in possession. Mr. *Hanson having, on the 18th of September,* 1801, contracted, as well with Mrs. *Hotchkin* as the reversioners, for the purchase of the premises, together with other freehold and copyhold lands, then in the occupation of one *John Cowell,* tenant, and Mrs. *Hotchkin;* they, by Mr. *Hanson*'s direction, on the 10th of February, 1802, surrendered the premises to the use of the *lessor of the plaintiff,* his heirs and assigns, and the *plaintiff's lessor* was on the same day admitted accordingly. The purchase money for the premises was paid by Mr. *Hanson,* for whom the plaintiff's lessor is only a trustee. At the time when Mr. *Hanson* agreed for the purchase, a written contract was made, containing *an exception of all subsisting leases (if any*

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Doe *dem.* Nunn *versus* Lufkin.

there were), and the terms of the demise to Lufkin *were correctly stated in the abstract of the title, which was delivered to* Mr. Hanson before the surrender of the premises or payment of the purchase money. On the 19th of March, 1802, Mr. *Hanson* caused notice to be delivered to the lessor of the plaintiff, that he would not give licence or consent to the duration or continuation of any under-tenancy of any copyhold lands or tenements in the manor longer than at will, or from year to year only. On or before the 23d of March, the *lessor of the plaintiff* gave the defendant notice to quit on the 29th of September following. No formal licence was ever given by the lord of the manor for the said demise to *Lufkin*. The defendants not having quitted the ejectment, was brought in November last. Soon after old Michaelmas, 1802, Mr. *Hanson* received from the defendants and gave them a receipt for a year's quit rent, in respect of the premises, and which quit rent had been regularly paid to him from 1794 till that time. Mrs. *Hotchkin* still living. The question for the opinion of the court was, Whether the lessor of the plaintiff was entitled to recover? If he were, the verdict to stand; if not, a nonsuit to be entered.

This case was very ably argued by Bosanquet,* *for the plaintiff*, and Marryat, *for the defendants*. For the plaintiff it was contended, "that by the terms of the *habendum*, in the demise to *Lufkin*, the licence of the lord was a condition precedent to the enlargement of the estate beyond a lease for one year certain; and therefore

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* He entered very fully into the doctrine of forfeiture of copyhold estates, and cited the following cases:

Lady Montague's case, Cro. Car. 233; *Sir William Jones*, 249; Co. Litt. 216 b; Cro. Jac. 301. 308; *Comyns's Digest*, "*Condition*," B. 3; *Lenthall* v. *Thomas*, 2 Keb. 267; *Hamlen* v. *Hamlen*, 2 Mod. 79. He examined also the cases in 1 *Salk.* 185; 1 *Show.* 284; 3 *Lev.* 326; 4 *Mod.* 80; *Yelv.* 222; *Cro. Jac.* 305; *Cro. Eliz.* 606. 622; and 2 *Mod.* 81.

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the demise worked no forfeiture *immediately*. That the *habendum* was not enlarged by the covenant for quiet enjoyment, or by that of re-entry upon the year's notice, according to the terms stipulated for. That therefore, for want of a licence, express or implied, from the lord, the first lessor Mrs. H., might have given notice to quit, as well as the lessor of the plaintiff; and even if she was barred by the covenant for quiet enjoyment, yet he would not be barred by it. That the receipt of the quit rent was no *waiver*, because until the notice to quit, the defendant's possession was not *tortious*."

For the defendant, it was insisted, "that the lessor of the plaintiff was a purchaser with notice; and that taking the whole of the lease together, it must be construed, according to the real intention of the parties, to be a lease *in presenti* for 14 years; and the covenant for *re-entry* as above, was urged as considerably aiding this construction. The word *and* was considered as meaning *or*. Then, as the lord had notice, it was contended that the receipt of quit rent was a waiver of the forfeiture."

Lord Ellenborough, C. J. "The terms in the *habendum*, for the exception of forfeiture, clearly constitute a condition precedent. It is a lease for a year certain; and then from year to year, during the term of 13 years more, *if the lord would give licence, and so as the same shall not become liable to be forfeited*. He never has consented; therefore it is no greater interest than for one year, which may be determined by notice from the lessor, or her assigns. If from the circumstances of the sale, and the clause concerning subsisting leases in the conveyance from Mrs. *Hotchkin* to *Hanson*, there is any ground for relief, that can only be in a court of equity. We have nothing to do with it. At law, the lease to the defendant is only from year to year."

The other Judges concurred in the same opinion.

Postea to the plaintiff.

1803. DOE *on the Demise of* GILMAN *versus* ELVEY.—*Nov.* 15

DEVISE to the testator's son H. G., *and to the issue of his body lawfully begotten, or to be begotten, his, her, and their heirs, equally to be divided, if more than one; and if he shall have no issue of his body living at the time of his decease, remainder to the testator's grandson* H. E., *in fee:* H. G. *enters, suffers a recovery, and dies without having had any children, having devised to the lessor of the plaintiff in fee: Held, that the recovery, so suffered, barred the remainder over to* H. E., *whether* H. G. *were tenant for life or in tail.*

DOE *dem.* GILMAN *versus* ELVEY.

THIS was an ejectment brought on the demise of *Ann Gillman*, widow, to recover the possession of a messuage or tenement, stable-yard, garden ground, and premises, situate in the town and port of *Dover*, in the county of *Kent*. The action was tried at the last assises for the county of *Kent*, when a verdict was found for the plaintiff, subject to the opinion of this court, on the following case:

John Gillman being seised in fee of the premises in question, by his will, bearing date the 28th day of March, 1772, duly executed and attested, devised the said premises as follows:

"I give and devise unto my beloved wife *Mary Gilman*, all that my messuage or tenement, with the outhouses, buildings, garden ground, and appurtenances thereto belonging, situate, lying, and being at a certain place called *Above-wall*, near *Cow-gate*, in the town and port of *Dover* aforesaid, now in my own occupation; and all other my real estate, to hold to my said wife, for and during the term of her natural life, she keeping the same in good and tenantable repair; and from and after her decease, I give to my son *Henry Gilman, and to the issue of his body lawfully begotten, or to be begotten, his, her, and their heirs, equally to be divided, if more than one;*

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Doe *dem.* Gilman *versus* Elvey.

and if my said son *Henry Gilman*, shall have no issue of his body, lawfully begotten, living at the time of his decease, then I give and devise the said messuage or tenement, outhouses, buildings, and premises, and all other my real estate unto my grandson *Hayes Elvey*, and to his heirs and assigns for ever."

The said *John Gilman* died in the month of November, 1775, leaving his said wife *Mary*, and the said *Henry Gilman*, his son, and heir at law, him surviving. The said *Mary Gilman* died some time afterwards; and upon her death, the said *Henry Gilman* entered into possession of the said premises, and being seised thereof, he, the said *Henry Gilman*, in Easter term, 1788, duly suffered a common recovery of the said premises, the uses whereof were by indenture, bearing date the 3d of April, 1788 (being the release to make a tenant to the *præcipe*), declared to be to the said *Henry Gilman*, and his heirs and assigns for ever.

The said *Henry Gilman* afterwards made his will, bearing date the 23d of June, 1788, which was duly executed and attested, and thereby devised the said premises to his wife *Ann Gilman* (the lessor of the plaintiff), her heirs and assigns for ever. The said *Henry Gilman* died in November, 1796, without having any child living at the time of the death of the said *John Gilman*, or at any time afterwards.

The defendant is the heir at law of *Hayes Elves*, named in the will of the said *John Gilman*.

The *question* for the opinion of the court was, Whether the *plaintiff* was intitled to recover?

This case was ably argued by Harvey, *for the plaintiff*; and Pitcairne, *for the defendants*.

The court held, that the words of the devise to *Henry Gilman*, corresponded in effect with those in *Doe* v. *Burnsall*;* and that upon the authority of *Loddington* v. *Kime*,† the recovery suffered would either bar the issue

* 6 Term. Rep. 30. † *Salk.* 224; 1 Lord *Ray.* 203.

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DOE *dem.* GILMAN *versus* ELVEY.

in tail, supposing it to be an estate in tail, or the contin gent remainder to the issue, supposing it an estate fo life.

POSTEA TO THE PLAINTIFF

SHORT *on the Demise of* SARAH GASTRELL (Widow *versus* SMITH *and* Another.—*Nov.* 28.

A. by will, duly executed, devises lands to B. *and* C. *in trust; afterwards makes a codicil, unattested, appointing two other per sons trustees and executors, in the place of* C., *and strikes out his name, and inserts their names instead, and makes some other alterations in the will: Held, that the obliteration of the name of* C., *being for the purpose of inserting other names, and only to make the former trust void in case the alterations could take effect, it did not amount to a revocation; at least, that the trust to* B. *continued, notwithstanding the alteration.*

SHORT *dem.* GASTRELL *versus* SMITH.

THIS was an action of ejectment brought for the re covery of certain premises in Gloucestershire, and tried by consent, before Lord ELLENBOROUGH, Chief Justice, at the sittings at Westminster.

At the trial a verdict was, by the direction of the learned Judge, found for the plaintiff, which the defendants were to be at liberty to move to set aside, and enter a nonsuit without costs; and on motion so made, the court was pleased to direct the facts to be put into the form of a special case for their opinion, viz.

The lessor of the plaintiff was the heir at law of one *Thomas Carwardine*, who, at the time of making his will hereafter mentioned, and at his death, was seised in fee of the premises in question, and of which the defendants, at the time of bringing the action, were in possession.

Aug. 27, 1795.—On, or soon after this day, the said *Thomas Carwardine*, being so seised, duly made and published his will, executed and attested, so as to pass real estates; and by which will the premises in question were

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SHORT *dem.* GASTRELL *versus* SMITH.

expressed to be given to *John Spellman* and *Edward Aldridge*. So much of what follows as is printed in the usual type, is a copy of the will in its original state, as so published and attested.

The testator afterwards made several alterations in the will; and, among others, struck out the name of *John Spellman*, and introduced the names of *James Wood* and *John Adey*, and did not afterwards republish his will. The alterations are distinguished in a fac-simile copy annexed, as follows, viz. the parts struck out are printed within crotchets, in small capitals, and the additions to the will in italics.

"This is the last will and testament of me Thomas Carwardine, of the city of *Gloucester*. *Imprimis*, I resign my spirit to God that gave it. *Secondly*, my body to be decently buried; all my just debts and funeral expences I desire shall be fully paid: from and after payment I do hereby give, devise, and bequeath all my real and personal estates and effects, of what nature and kind soever, and wheresoever, which I shall be possessed of, interested in, or intitled unto, or in reversion of at the time of my death to [JOHN SPELLMAN, GENT.] *James Wood, Esq. banker, and Mr. John Adey, of the city of Gloucester, pitmaker,* and Edward Aldridge, of Bishey, in the county of Gloucester, brewer, or their heirs and assigns, whom I nominate, constitute, and appoint my executors of this my last will and testament, upon trust, as follows: My will and desire is, my sister Sarah Gastrell shall have only one shilling for her unnatural and illiberal behaviour towards me. I give and bequeath to my housekeeper Betty Tombs, the house I now live in (the pew in the church to go with the house), for the term of years which are to come, and full power to renew in her own name with the dean and chapter of Gloucester. I also give her all fixtures, standards, together with all my household goods and chattels, that is to say, all my linen, china ware, and plate, &c. (except my tankard, watch, and two sets of silver buckles, &c.) I also give and bequeath her, for her faithful services, 200*l.*

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SHORT *dem.* CASTRELL *versus* SMITH.

of principal money on Mrs. Jefferies's estate, at Minsterworth, and 10l. to buy her mourning. I will and order my executors, before-mentioned, or their heirs and assigns, on the trust aforesaid, to sell all my estate at Sandhurst, both freehold and leasehold, for the most monies they can get, as soon as they can conveniently after my decease: after all expences attending the sale be paid, the monies arising from such sale to be distributed in six shares among my first cousins (on my father's side); viz. to George Hill, of Tainton, two shares; to Richard Hill of Uphedon, one share; to Mrs. Barnford, of South Wales iron works, one share; to Margaret Godwin, of Staunton-upon-Wye, one share; and to the lawful children of the late Elinor Godwin, sister to the above Margaret Godwin, of Staunton, one share. If either of my first cousins should die, then their lawful children to have their parents' part divided equally between them. I also give and bequeath all my estate, house, and lands, lying and being in the hamlets of St. Michael and St. Mary near the city, but in the county of Gloucester, to the lawful children of my executor and first cousin Mr. Aldridge, of Bishey, in the said county, (both freehold and leasehold), their heirs and assigns for ever, when they attain the age of twenty-one years, subject nevertheless to the following conditions, to be paid out of the above mentioned premises. I further give and bequeath to my housekeeper, Betty Tombs, an annuity of [TEN POUNDS [*twenty pounds per year*] payable half-yearly out of the last-mentioned estate for her natural life. I give and bequeath to the churchwardens of the parish of St. Michaels (for the time being) the interest of 50l., issuable and payable out of the freehold lands before-mentioned for ever, to be given to ten poor widows, or (householders *of good report*), not receiving alms, yearly, on the 21st day of March, and on every succeeding 21st day of March, for ever; to the poor residing in Barton-street, 5s. each, part in the city, and part in the hamlet. I give and bequeath out of my rents and cash in hand, 20l. to the governors of the Gloucester Infirmary, towards that charitable institution. And I give and bequeath to *Elizabeth Tailing*

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niece to my housekeeper, Betty Tombs, five guineas, to be paid at my decease, *(and a moiety, or half part, of* 200*l.*, *left her aunt on the other sheet)*. I appoint my executor and trustee Mr. Aldridge my residuary legatee; my further will is, that my executor [MR. SPELLMAN], *James Wood, esq., banker, and Mr. John Adey, pinmaker,* shall take *ten* pounds *each*, of lawful monies, to [HIS,] *their* own use, as some acknowledgment for [HIS] *their* trouble. My desire is, that my executor, Mr. Aldridge, do take to his own use, my tankard, *my* watch, and two sets of silver shoe and knee buckles immediately after my interment, with my wearing apparel to be given to my first cousins, George and Richard Hill. Lastly, I do hereby revoke all former and other wills by me at any time heretofore made, and do declare this to be my last will and testament. In witness whereof I the said Thomas Carwardine have hereunto set my hand and seal this 27th day of August, in the year of our Lord, one thousand seven hundred and ninety-five,

THOMAS CARWARDINE."

Signed and sealed by Thomas Carwardine, the testator, by him published and declared as and for his last will and testament, in the presence of us, who in his presence, and at his request, have subscribed our names as witnesses hereto,

THOMAS CALLIS;
WILLIAM WARD,
JOHN AVERY.

"Item: If it should so happen, that my first cousin, Mr. Thomas Drake, survive me, I desire he may be paid five guineas to buy mourning, T. C. The additional annuity, making 20*l.*, to Betty Tombs; and the interlining, appointing the moiety, or half part of 200*l.*, to Elizabeth Tailing, (mentioned in the former part of this will), was done the 21st day of October, 1798, by me,

"THOMAS CARWARDINE, testator."

"With Mr. Aldridge. As a codicil hereto, for appointing James Wood, esq. banker, and Mr. John Adey,

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SHORT dem. GASTRELL versus SMITH.

pinmaker, my executors to this my will in trust, with the erasures, was done this 23d day of July, 1799, by me,

"THOMAS CARWARDINE, testator."

The question for the opinion of the court was, Whether the said *Thomas Carwardine* died intestate, as to these premises? If the court should be of opinion that he did, the verdict to stand. But if the court should be of opinion that these premises passed by the will, then a nonsuit to be entered.

ABBOTT, *for the plaintiff*. "The alterations and obliterations have rendered the will void, it never having been republished. *First*, the three trustees named cannot take at law, because the will, with a devise to them in its altered state, was never republished. *Secondly*, neither the two original trustees can take, nor the one only, (*Edward Aldridge*), whose name was suffered to remain; because it was evidently not the intention of the testator, as may be collected from the fact of the alterations in the will, that either the two first, or *Aldridge* alone, should take the devise. *Obliteration*, since the statute of frauds, is one mode of revocation; and although like cancelling it may be an equivocal act, as was said by Lord *Mansfield*, in *Burtenshaw* v. *Gilbert*,* yet the instances given there, in which a will would remain valid, notwithstanding obliteration, are all accidental mistakes. But here, the act of obliteration was done intentionally, and with a design to revoke the will as to that devise.† In *Brooke* v. *Ward*,‡ which was before the statute of frauds, the testator revoked his will by *parol*, and declared it his intention to make another, but was murdered in his way to London for the purpose of making his will; and it was held, that the act of revocation was complete, though the other will was

* *Cowper*, 52.

† Here he cited *Onions* v. *Tyrer*, 1 *P. Williams*, 343, *et al.* and argued upon it as in his favour.

‡ *Dyer*, 310. *b*.

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not made. So here, if the testator intended to alter his will, and does not do it effectually, yet the revocation is complete."

[GROSE, J. "In the case in *Dyer*, the revocation was a substantive act; here the revocation and the alteration are one and the same act."]

DAUNCEY, *for the defendants.* "The testator lived a year after the making the alterations, and if he had intended to have revoked the will, and made a new one, he had time to do so; but as he never made a new one, it must be presumed he died with an intention, that the will in question should stand subject only to the alteration in the names of the trustees. If he was under a mistake, the alteration and obliteration being done *uno flatu*, that which was intended as an alteration of the devise, cannot operate as a revocation, unless it be effectual for the alteration, which was the real purpose of the testator; *Burtenshaw* v. *Gilbert*;* *Onions* v. *Tryer*. The heir at law, having been once clearly disinherited, must shew a clear revocation of the will, by which his inheritance is taken away; but no intention to alter the will in that respect appears here; and whether the devise be good to the two or the three trustees, or to one only, the heir at law is ousted of his title. He further cited *Sutton* v. *Sutton*;† *Larkins* v. *Larkins*;‡ *Humphries* v. *Taylor*;§ *Eccleston* v. *Petty*;‖ *Willett* v. *Sandford*;¶ *Acherley* v. *Vernon*;** and *Onions* v. *Tyrer*."

The court took time to consider; and on this day the opinion of the court was delivered to the following effect by

Lord ELLENBOROUGH, C. J., after stating the case. "It has been contended, that the testator *Thomas Car-*

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* *Comp.* 52. † *Bac. Abr.* 5 edit. 7. 363. ‡ *Carth.* 80.
§ 1 *Vesey*, 178. 186. ‖ 9 *Mod.* 68. 3 *Bro. P. C.* 107.
¶ *Cowper*, 812. ** 3 *Bos. and Pull.* 16.

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wardine has died intestate, as to the premises in question, and that the heir at law is entitled to them, on the ground that the name of *John Spellman*, one of the trustees, was obliterated, and the names of two other persons inserted instead, *animo revocandi*; and that he either intended to make a new will, or at least to republish the will in its present state, which, for want of such republication, is of no effect. For this purpose, (*Dyer*, 310, *b*.) has been cited as an authority. The facts of this case, however shew, that the testator designed his will to remain unaltered in respect to the effect of the devise, and when it is clear he had disinherited his heir, it would be unjust to suppose he intended to render that devise ineffectual, so as to let in the heir in the mean time, rather than to conclude that he intended only to alter it so as to change one of the trustees in order to put two others in his place. If such be the case, and so it appears to us, then the testator meant no revocation absolutely, and had no intention to revoke, by obliterating the name of one trustee, but by an *effectual* substitution of others. If so, this case must be governed by the case of *Onions* v. *Tyrer*. But it has been further argued, that supposing the obliterating the name of *Spellman* be an effectual revocation, it is only so *pro tanto;* and the devise is not wholly void, inasmuch as the devise to *Aldridge*, the other trustee, remained unrevoked. And we think there is great weight in this argument; and that the interlineations not operating to pass the trusts to the other persons, the devise to *Aldridge* is notwithstanding in full force, and competent to sustain all the trusts in the *original* will."

A NONSUIT TO BE ENTERED.

BUSK *versus* FEARON, *and Others.*—*Nov.* 15. 1803.

B. *advances money to* F. on respondentia; *the condition of the bond recites, that the money was advanced* on goods *on board the ship* Belvedere: *the condition is, that if the ship proceed from the* Thames *on a voyage to any port in the* East Indies, *&c. and from thence return to the river* Thames, *at or before the end of* 36 *calendar months from the date, and there end her voyage, &c. (the casualties of the seas excepted); and if within* 30 *days after her arrival* F. *pay the money, and* respondentia *interest, or if the ship shall be entirely lost in the voyage, and* F. *shall duly account upon oath for the fair average on the goods on board the said ship, then the obligation to be void:*

Held, that F. *becoming a bankrupt,* B., *the obligee, has no* lien *upon the goods on board the ship, under the form of this obligation.*

BUSK *versus* FEARON.

THE *plaintiff* sued on behalf of himself and other creditors of *J. P. Fearon,* who had lent money upon *respondentia,* on goods laden on board the ship *Belvidere,* against the defendant *J. P. Fearon,* a bankrupt, and his assignees, and the *East India* company and *Ann Douglas,* widow; whereupon the following case was sent by the lord chancellor for the opinion of this court.

J. P. Fearon, commander of the *East India* company's ship *Belvedere,* and *P. Douglas,* now deceased, gave *Busk* a *respondentia* bond, dated the 4th of May, 1801, by which they jointly and severally bound themselves in the penal sum of 1500*l.*, with a condition, reciting, that whereas *Busk* had advanced to *Fearon* and *Douglas* 750*l.* upon the goods, merchandises, and effects laden, and to be laden on board the ship *Belvedere,* then at anchor in the *Thames,* outward bound to *China,* whereof *Fearon* was commander; the condition of the obligation was, that if the said ship should proceed from the river *Thames,* on a voyage to any port in the *East Indies,* *China,* &c. and from thence return to the river *Thames,* at or before the end of 36 calendar months from the date,

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and there end her said intended voyage (the dangers and casualties of the seas excepted); and if *Fearon* and *Douglas*, or either of them, &c. should, within 30 days next after her arrival, &c. pay to *Busk* 1020l., together with 13l. 10s. per calendar month, for every calendar month, and so proportionably, &c. as shall be elapsed out of the said 36 calendar months, over and above 20 calendar months, to be accounted from the date; or if in the said voyage, and within the said 36 calendar months, the ship should be entirely lost by fire, enemy's men of war, or any other casualties; and *Fearon* and *Douglas*, their heirs, &c. should within six calendar months next after such loss, well and truly account for, upon oath, if required, and pay to *Busk*, his executors, &c. a just and proportionable average on all the goods and effects of *Fearon* carried from *England* on board the said ship; and the nett proceeds thereof on all other goods and effects which *Fearon* should acquire during the said voyage, for or by reason of such goods, merchandises, and effects, which should not be unavoidably lost, then the obligation to be void. *Busk*, the obligee, paid *Fearon* 750l., the consideration money; *Fearon* loaded on board the ship *Belvedere*, goods of the value of 10,000l.; and the ship sailed from the river on her said voyage, and arrived with her cargo at *China*, where *Fearon* disposed of those goods, and with the produce thereof bought other goods, which he loaded on board the ship at *China*; and the ship afterwards arrived safe, with her homeward bound cargo on board, in the river *Thames*, on the 29th of September 1802. The goods so brought from *China* were deposited in the warehouses of the *East India* company, according to the bye-laws and regulations of the company, and part of them have been sold for 7000l.; and the money received by the company, and 3000l., part of that sum, hath, since the commencement of the suit, been paid over to the assignees of *Fearon*; and 4000l., the residue, yet remains in the possession of the company. *Douglas* is dead, intestate; and *Ann Douglas* is his administratrix. On the 12th of February, 1803, a commission of bank-

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rupt issued against *Fearon*, under which he was declared a bankrupt; and the other defendants in the suit are his assignees. The question for the opinion of the court was, Whether *Busk* had by law, in respect of the money remaining due to him, by virtue of the bond above stated, any *lien*, upon or interest in, the said money or goods so remaining in the possession of the *East India* company, or either, and which of them? and whether the same, or either, and which are or is by law liable to satisfy what so remains due to *Busk*?

This case was ably and elaborately argued by BAILEY, Serjeant, *for the plaintiff*; but the court thought it unnecessary to hear GIBBS, *who was for the defendant*.

Lord ELLENBOROUGH, C. J. observed, that the forms and consequences of respondentia bonds were different in different countries; but considered this case as depending upon the literal construction of the instrument. And the court afterwards certified as follows:

"We are of opinion that, under the circumstances of this case, the said *Hans Busk* hath not by law, in respect of the money remaining due to him by virtue of the bond above stated, any lien upon, or interest in, the said money or goods so remaining in the hands and possession of the *East India* company; and that neither the said money or goods are by law liable to satisfy what so remains due to the said *Hans Busk*."

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EARL OF KERRY *versus* BAXTER, *and* Others.—*Nov.* 18.

To debt on bond, the defendants in their plea set out the condition for the performance of an agreement for building a house, &c., reciting the same in part, viz. that one of the defendants had covenanted to build, conformable to certain plans, signed by the plaintiff and the said defendant, and deposited with the plaintiff conformably to the particulars of the building to the said agreement annexed, amongst which particulars, *&c.; and also referring to other terms in the agreement* particularly *set forth, by which it plainly appears, that the whole is not set out in the condition; the defendants then plead* performance *generally, to which the plaintiff demurs specially: Held, the plea is bad, for the deed ought to have been set out, that the court might see whether there were any negative or disjunctive covenants.*

Query. *Whether it might not have been sufficient for the defendants to have averred, that there were no negative or disjunctive covenants in the agreement.*

EARL OF KERRY *versus* BAXTER

THIS was an action of debt on bond for 2000l. The defendants in their plea craved *oyer* of the bond and condition, and set them out. The condition recited articles of agreement between *the plaintiff* and *Baxter* to build the *plaintiff* a house, whereby *Baxter* covenanted to build conformable to certain plans, signed by the *plaintiff* and *Baxter,* and deposited with the *plaintiff, conformably to the particulars of the building to the said agreement annexed; amongst which particulars* it is mentioned, that if any variation should be adopted in the plan there laid down, which should be an additional expence to *Baxter,* it should be paid by the plaintiff, but not unless agreed to in writing, and not to be inferior to an adjoining house. There were several other stipulations mentioned in the condition with reference to the *agreement,* as that *Baxter* should grant a lease on the terms and conditions in the said agreement particularly set forth; and the condition was for performance by *Baxter* of the covenants, &c. on

his part in the said agreement. The plea concluded with averring generally, that *Baxter* had done and performed all the covenants, matters, and things on his part, &c.

Special demurrer for the plaintiff, assigning for cause, that the defendants had not set forth the said articles of agreement in the plea; that for any thing which appeared to the court, they might contain *negative* and *disjunctive* covenants, to which performance generally could not be pleaded. That the articles not being before the court, or set forth in the plea, or in the record, could not be pleaded. The defendants joined in demurrer.

DAMPIER, *for the plaintiff*, contended that the plea was bad. "It appears by the condition that the whole of the agreement is not recited in it, and there is no averment in the plea, that the whole of it is set out. In pleading, every thing is to be taken against the party who produces or states a deed in part; and though, if the plaintiff had set out the whole of the articles in his replication, it might have helped, yet the *onus* ought not to be thrown upon him. For the defendant is to make out his own defence, and discharge himself of the bond; and general performance cannot be pleaded without setting out the whole of the agreement to be performed; for if it appear that any of the covenants are in the negative, the plea must be special; 1 *Sid.* 50. He also cited 1 *Lev.* 303, and *Lewis* v. *Ball* *; *Tapscott* v. *Woolridge* †; *Jevins* v. *Harridge* ‡; and *Plummer* v. *Rayne* §, In the last case, debt on bond for performance of covenants in an indenture, the defendant pleaded performance generally; the plaintiff set out the indenture with negative covenants, and demurred; and the plea was held bad."

"BARROW, *for the defendants*, endeavoured to distin-

* *Sid.* 97. † 1 *Ventris*, 37. *Carth.* 5. ‡ 1 *Saunders*, 9.
§ Michaelmas, 7 *Geo.* III. MS.

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guish the case from those cited, and to shew that sufficient was set out, and pressed the hardship of being obliged to set out all the plans."

Lord ELLENBOROUGH. "The words in the condition, '*among which*,' like *inter alia*, clearly shew there were other stipulations not therein set forth, and we must take it so. Had you averred, *by way of experiment*, to avoid the expence of setting out the whole, that there were no negative or disjunctive covenants, the other side might have set out the agreement and have shewn the contrary, and that *perhaps* might have done. But at present the argument for the plaintiff goes upon known rules of pleading, and the defendants cannot in such a case be permitted to amend after argument. What is required here is both agreeable to the sound rules of pleading, and to common sense; for if the whole be not stated, we must have an issue on the identity of the indenture; and *at nisi prius* we might have a multitude of instruments thrown into the cause which have no concern whatever with it, for a deed might be produced agreeing in part with that in dispute, though not altogether the same. This difficulty is removed when the covenants are fully detailed. JUDGMENT FOR THE PLAINTIFF.

LANG *versus* COMBER *and* Others.—*Nov.* 21.

PLEA in abatement, averring that the promises in the declaration, if made at all, were made, &c. is verified, by affidavit actually sworn before the declaration is filed, but turns out to be applicable, in fact, to the declaration, which is on promises: Held, well filed, and not a nullity; and the plaintiff cannot sign judgment as for want of a plea verified by affidavit.

LANG *versus* COMBER.

THIS was a rule to set aside interlocutory judgment, for want of a plea, on the ground of irregularity, when a plea in *abatement* was actually filed, stating, that the three defendants had a fourth partner, who ought to have been sued.

WOOD, who shewed cause, contended that there was not a sufficient affidavit accompanying this plea, to

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entitle the defendants to file it. "The declaration was *filed* on the 25th of June, in assumpsit. The plea was filed on the 27th, and the affidavit accompanying it was sworn on the 25th of June, at *Liverpool*, containing the usual averment, as to the *promises in the declaration* having been made, if at all, by the defendants and other persons. But when the affidavit was made, it was physically impossible for the defendants to know what were the promises in the declaration. They make an affidavit, without seeing the declaration, which from the nature of it implies that the declaration has been seen and taken out of the office. It was therefore a perfect nullity, for if such an affidavit were admitted in support of a plea in abatement it would be allowing the defendants to trifle with the solemnity of an oath."

THE COURT, however, held, that the plea could not be considered as a nullity, for if the affidavit were not true, the defendants might be indicted for perjury, and as there are but four days time to plead in *abatement*, they might be excused for swearing, from a knowledge of the real nature of the demand, and of the nature of the declaration, which they might have been informed of by *the attorney* before the declaration was actually filed, especially as they had sworn truly.

RULE ABSOLUTE.

The KING *versus* THORNTON.—*Nov.* 14.

The KING versus THORNTON.

INFORMATION, in the nature of a *quo warranto*, against the defendant, for exercising the office of senior bailiff of the town of *East Retford*, in the county of *Nottingham*.

Plea, demurrer, and joinder thereupon.

The question turned upon the construction of the charter of the 25th of Nov. 5 *Jac.* 1. Under which the corporation was to consist of *two* burgesses, to be called *senior* and *junior* bailiffs, and twelve burgesses to be called *aldermen*. *W. T.*

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and *N. W.* were then nominated the first senior and junio bailiffs, to continue in *their offices* until the feast of S *Michael*, then next ensuing, *and from thence until th other of the burgesses, should, in due manner be electe perfected, and sworn*, according to the charter. Th bailiffs and burgesses were to chuse twelve aldermen, the more *honest* burgesses, to be aldermen *for life*, b liable to be amoved, to be of the common council of t town and *assisting* to the burgesses. The future baili to be elected by the *bailiffs* and aldermen, or the maj part of them, for the time being, on the first Monday August; one as senior bailiff, out of the aldermen to sworn in, before the *last bailiffs*, his predecessors, and execute the office for one year, from thence, until o other of the aldermen to that office, in due manner, shou be elected, perfected, and sworn. The junior bailiff to elected out of the burgesses, in the same manner, *mutat mutandis*. There was a provision for swearing their su cessors, in case either should die. At the election of *t defendant* (by authority of a writ of mandamus under t stat. after a judgment in *quo warranto*, against several the *preceding bailiffs*, and after an election, omitted to had on the charter day, and the day following). *D. I* a *senior* bailiff, duly elected, &c. in 1797, and *T. B.* a *juni* bailiff, duly elected, &c. in 1796, presided and administere the oath to him, and his election was at a meeting of the two bailiffs and *six* aldermen.

The objections stated in the demurrer book, upon whi the question arose, were two: namely, that this was not good corporate meeting; 2dly, That the proper office were not presiding at it.

After argument, *in Trinity term*, by DAMPIER, *for t crown*, and READER, *for the defendant*.

Lord ELLENBOROUGH, C. J. delivered the opinion the Court, this day, to this effect. "That after the fi year from the charter, there could only be twelve alde men, one of whom would be senior bailiff, although t first senior bailiff was not an alderman, and that six alde

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men, together with such senior bailiff, constituted a majority of the corporate body of aldermen, and consequently with the junior bailiff, were together a competent meeting in that respect for the election. That as to the second point, the sufficiency of the presiding officers, the two bailiffs held *distinct* offices. That by the charter each bailiff continued till his successor was *duly* elected, perfected, and sworn. That, by the ouster of the intermediate bailiffs, *D. W.* and *T. B.*, were the last legal bailiffs, and that, notwithstanding their election at different times, they were competent to preside together. And therefore that such election under the mandamus was valid.

JUDGMENT FOR THE DEFENDANT.

In order to fulfil our promise of comprizing the cases of this term in the 13th and 14th Numbers, we have abridged the above case, after having prepared it for insertion at full length. We have also notes of three others which we are obliged to omit, it being impossible to abridge them sufficiently for the purpose of insertion. We shall therefore only add, that in *Lord Nelson* v. *Tucker*, in error from the court of Common Pleas *, this court reversed the judgment of the court below, and established as a clear principle, that under the 4th article of the king's proclamation, 1797, the commanding flag officer's 1-8th share of prizes belongs to the *effective*, *present*, *acting* flag officer on the *station*, and not to the superior officer, nominally on the station, *returning* home, and leaving the ships behind to act under another command; notwithstanding the prizes in question were taken by an officer dispatched from the fleet by orders of the admiral returning home and before that officer could receive orders from the admiral left behind, and while the former continued to retain the title of admiral on that station, with the pay, table money, &c. *Lord Keith* v. *Pringle*, turned upon the same point. Of the case of *Doe* dem. *Reay* v. *Huntingdon*, we may find an opportunity hereafter to insert a short report.

* 3 *Bos.* and *Pull.* 257.

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IN THE COURT OF CHANCERY,

IN MICHAELMAS TERM.

DEANE *versus* TEST.

A TESTATOR, after devising 4000l. stock in the four pe cents. to B. for life, and after her death to his, the testator's sister children, equally to be divided, bequeaths to the same childre "an additional sum of 2000l. more, to be paid out of his 4l. pe cent. consolidated Bank annuities; and in case of the death of an of them before attaining their respective ages of twenty-one years then to be equally divided among the survivors, share and shar alike:" Held, this is a devise of 2000l. money and not stock.

DEANE *versus* TEST.

THIS bill was filed, in order to determine a question, Whether a legacy of 2000l. was a legacy of stock, or of so much in money? The bill stated, that the testator, *John Hoskins*, died on the 14*th of October*, 1792, having first duly made and executed his will, by which he devised to his sister *Harriet Ann Best*, during her natural life, the interest of 4000l. stock, standing in his name, in the four per cent. annuities; and, after her death, then to the children of his sister *Lucy Deane*, to be divided equally among them, share and share alike; and in case of the death of any of them, before they respectively attained the age of twenty-one years, then to be divided equally among the survivors, share and share alike. The will also contained the following clause, upon which the present question was raised. "I likewise give and devise "unto my sister *Deane*'s children, an additional sum of "2000l. more, which is to be paid out of my four per "cent. consolidated Bank annuities; and in case of the "death of any of them, before attaining their respective "ages of twenty-one years, then to be equally divided "among the survivors, share and share alike." And the testator devised the residue of his estate and effects, after

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payment of his debts and legacies, to his cousin, the defendant *Thomas Test*. The testator died, leaving his sister *Harriet Ann Best*, and his sister Mrs. *Deane*, and her children surviving him.

Mr. ALEXANDER and Mr. TROWER, *for the plaintiffs*. "This is simply a question of intention, Whether the testator, by his will, has left a legacy of 2000l. in money, or 2000l. in stock? This is a legacy of 2000l. to be paid out of 4000l. four per cents.; and the plaintiffs contend, it is a money legacy. He gives it as an additional sum of 2000l. *more*; but the words *an additional sum* do not imply, that it must be of the same species with the prior bequest. Money legacies merely bear interest twelve months after the testator's death; but there is nothing to postpone the *interest* in this will. Here the interest is vested immediately, and only subject to be divested by the death of any of the legatees before they attain the age of twenty-one. This case is very similar to that of *Kirby* and *Potter*, in 4th *Vezey*. If the testator had intended his legacy to be paid in stock, he would have used the same words as he does in the former part of his will; but he says, "I give them 2000l. more;" and the only doubt which can be raised is on the word *more*, which must mean *in addition*, and cannot be considered with any reference to his prior bequest of stock."

Mr. ROMILLY and Mr. WILSON, *for the defendant, the residuary legatee*. "The only question in this case is, Whether the plaintiffs are intitled to stock or to money? This has no resemblance to a question whether it is a pecuniary or specific legacy. It must be specific. Every legacy of money to be paid out of stock must be specific. According to the construction put upon this will by the plaintiffs, the testator has directed his executor to purchase stock for the purpose of paying money. This will most nearly resembles that in the case of *Ashburner* v. *Macguire*, of which there is a report in 2 *Brown*, 108. In every pecuniary legacy in this will, excepting the one which the plaintiffs are intitled to, the testator uses the words 'lawful money of Great Britain;' so that he always

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contrasts them with those of stock. This legacy is to be paid out of 4000l. four per cent. annuities; and the circumstance of the manner in which it is to be paid, proves that he meant stock; for every child is to have his portion on attaining twenty-one, and not till then. The words 'an additional sum of 2000l. more,' are extremely material to prove that the testator spoke with reference to his former bequest of stock. *Kirby* and *Potter* has no application to this case; for the words there were different, and taken upon their own individual meaning. The master of the rolls there thought that the word *some* converted the legacy into a pecuniary one. Upon the whole, the testator here must clearly mean, that he gave these parties two additional thousands out of his four per cents."

Mr. ALEXANDER, *in reply.* "All the presumptions in this case are with the plaintiffs; for the court always leans against specific legacies. If the words *additional* and *more* are taken away, then this is exactly the case of *Kirby* and *Potter*, which was held to be a pecuniary legacy. In this will, where the testator intends stock, he always says so, and wherever he speaks of stock he always adds those words to his description."

Lord CHANCELLOR. "The question upon the words of this will, is upon the bequest of an 'additional sum of 2000l. more' to the children of his sister *Lucy Deane*, to be paid out of his four per cent. consolidated Bank annuities: and in deciding this case, I must admit, that my opinion goes upon nothing more than conjecture upon the whole of this will taken together. The gift of a legacy, such as this, ought, beyond doubt, *primâ facie*, to be taken as pecuniary; and there is no occasion here to discuss many questions which have been stated, as particular directions in a will frequently arise from the wish of a testator to determine the priority. Saying that this legacy is, *primâ facie*, pecuniary, is certainly carrying it as far as it can go; but then is this *primâ facie* evidence of intention sufficient? I think you must certainly abide by it, *until* you are driven from it by strong rational inference arising from other parts of the will. It is true, that the testator

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in this will, speaking of the 4000l. stock to his sister, uses the words *to be paid*, when he ought to have said *transferred*; but I yet think that, upon the whole, he intended in this case an immediate legacy of some species or other. It is contended, that when the testator says, 'I likewise give to my sister *Deane's* children an additional sum of 2000l. more, and to be paid out of my 4000l. stock,' the word *more* must mean *ejusdem generis* with the former legacy; but critical observations upon the words of a will form no certain clue to guide the judgment: yet as he directs this additional sum to be divided amongst his children, as in the former bequest, the circumstances of his giving it in addition, and upon the same limitations, are certainly material to be considered, in endeavouring to find out the intention. But do they afford inference enough to take it out of the *primâ facie* meaning? In this will, wherever a gross sum of money is given, it is always described, with much particularity, as lawful money of Great Britain; and it is the same in the codicil. Where he describes stock, he is equally accurate; for, he says, 100l. stock, and when he gives the first 4000l., to which this legacy is an addition, he clearly gives it as stock. There is no legacy in the whole of this will which the testator meant to be in stock, but he so describes it as to end all doubt. It is certainly difficult to bring together, in any part of it, a legacy of stock and money to the same person in this will; for the only exception I find is in the bequest to his housekeeper, to whom he gives, first, 100l. sterling, and 50l. *per annum*, to be paid out of stock, and then 1000l. three per cent. stock; but each of these he accurately describes. In the construction of a will, where the phraseology affords different inferences, the doubt is, Whether you have fairly developed the whole? But the best rule to abide by is, the *primâ facie* inference, unless you are clearly driven from that by something more than plausible arguments. Upon the whole of this case, I cannot say that the *primâ facie* inference is not the real meaning; and I therefore think that this is a legacy of money, and that the children of Mrs. *Deane* are intitled

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to it immediately; for his mention of stock in this bequest must be considered merely as pointing out from what fund the legacy was to be paid."

DRAKE *versus* WOODFORD *and* Another.

THE custody of an examination, taken under a dedimus *in the country, belongs to the clerk in court, who is intitled to make the copies of it. If sworn in town, it belongs to the master.*

DRAKE versus WOODFORD.

MR. LLOYD moved, that Master *Holford* might be ordered to deliver up to Mr. *Barker*, clerk in court for the defendants, the writ of *dedimus*, and the *examination* of the defendants taken thereupon, to be preserved as part of the records of the court. One of the defendants lived at *Vauxhall*, and the other at *Winchester*. The writ of *dedimus*, therefore, authorised the commissioners to take the examination of each separately. A joint examination was, however, prepared; and the commissioners swore the defendant residing in the country, but the defendant living in town was sworn before the master.

Mr. LLOYD contended, "that although the regular course would have been to have made a separate examination, yet as the examination was actually sworn by one of the defendants in the country, the practice was, that the clerk in court should have the custody, and make the copies."

Lord CHANCELLOR. "This proceeding is founded in mistake altogether; for there is no authority given by this *dedimus* to take a joint examination. There must be a separate one for the defendant residing in town; and the *dedimus* must be returned to the regular custody. I shall make no order in the case; but the examination in the country must be given up to the clerk in court, and the remainder of it is worth nothing."

GUY *versus* BURGESS.

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On a motion to review the taxation of a bill of costs commenced during a client's minority, it was granted accordingly, on the ground, that a continued employment when of age, might, under circumstances, amount to an undertaking to pay the prior bill.

GUY versus BURGESS.

THE *plaintiff* was employed in his business, as an attorney, by the *defendant*, during his minority; in which time a considerable debt was incurred to the plaintiff. The defendant also continued to employ the plaintiff, after he came of age, in the completion of the business commenced during his minority. Upon a reference to the master to tax the plaintiff's bill, the master disallowed all the charges incurred during the minority of the defendant. A motion was now made, that the master should be ordered to review his taxation.

The CHANCELLOR made an order to refer the matter back to the master, upon the ground, that the continued employment, after the defendant's coming of age, might amount to an implied undertaking to pay the prior part of the demand incurred during minority, and directed the master to inquire and state the circumstances. *The plaintiff to pay the costs of the motion.*

ANONYMOUS.

A DEFENDANT cannot be ordered to produce deeds, &c. unless stated in a schedule to his answer, or at least described with certainty. The practice formerly was to pray a schedule in the bill; and it is so still in Ireland.

ANONYMOUS.

MR. WETHERELL moved, that the defendant might be ordered to produce, in the usual manner, all deeds, papers, and writings in his custody, relating to

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the matters charged in the bill. The defendant, in his answer, admitted that he had some deeds in his possession, but had not annexed any schedule of them. Mr. WETHERELL therefore suggested, that the best manner of framing the order would be, that he should be directed to produce all deeds in his custody relating to the matters in question, with liberty for the plaintiff to take exceptions to the production, if it should be insufficient, which he thought agreed with the spirit of Lord ROSSLYN's general order.

Lord CHANCELLOR. "This motion is grounded upon the insufficiency of the answer, instead of the regular mode being adopted, which would be to file exceptions. It is true, that my Lord ROSSLYN, in a case of *Mason* and *Gardner*, made an order for production where there was no schedule; but that was the case of a single deed, which he thought was described with sufficient certainty in the answer to authorise him to do so. It used to be the practice formerly in this court for the bill to pray, in the first instance, that the defendant should set out a schedule of all deeds, &c. before he answered; and it is still the practice in Ireland. I do not know where this is to stop. It is clearly impossible for me to make any order for production without a distinct admission upon record of the defendant's having the particular deeds in his possession."

MOTION REFUSED.

Ex-parte WHALLEY *in re* WHALLEY.

A COMMISSION of bankruptcy cannot be taken out by a person who is appointed, and acts as a trustee under a deed of assignment for the benefit of creditors, although he does not actually execute the deed.

Ex-parte WHALLEY *in re* WHALLEY.

THIS was a petition to supersede a commission of bankruptcy issued against the petitioner, on the ground that there was no act of bankruptcy. The bankrupt

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Ex-parte WHALLEY in re WHALLEY.

being embarrassed, called his creditors together, when it was agreed, that an assignment of his effects should be made to trustees. The petitioning creditor for the commission was appointed, and acted as a trustee, although he never signed the deed, it being agreed by all the creditors that he should not sign, in order that he might take out a commission of bankruptcy in case *Whalley*, the bankrupt, should not act properly.

Mr. MANSFIELD *and* Mr. STEELE, *in support of the petition.*

Mr. ROMILLY *and* Mr. HEALD, *for the petitioning creditor.* "It is not necessary that a deed of assignment should either be for the purpose, or have the effect of delaying the payment of debts, in order to make it an act of bankruptcy. There has been perfect good faith in the whole of this transaction, nor is it even alleged, that the bankrupt has been imposed upon. His committing a clear act of bankruptcy was only prevented by the execution of this deed. Cited *Bamford* v. *Baron* *.

Mr. HEALD. "In that case the party was ignorant that he was committing an act of bankruptcy, and there was no privity in the petitioning creditor."

Lord CHANCELLOR. "It has long been settled, that where a man executes a deed of assignment, he cannot make such a deed an act of bankruptcy by his debtor; and if he acts under it, it is the same as if he had actually signed. I am therefore of opinion, that this commission cannot be sustained. The case of *Bamford* v. *Baron*, which I argued in the King's Bench, went upon many more grounds than those stated in the report."

* 2 Term Rep. 594.

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In re HALL *ex-parte* DOBS.

Where a docket is struck for a commission of bankruptcy, although the commission is not issued within the time limited by the general order, yet a second commission cannot be sustained without an order of supersedeas *for the first.*

In re HALL *ex-parte* DOBS.

THIS was a petition to supersede a prior commission of bankruptcy issued against *Hall*. The docket had been struck for the first commission, but no order for sealing it had been given in due time. It consequently became supersedeable, and a second docket was struck by the petitioner, but no order of *supersedeas* for the first docket was actually drawn up. Two commissions had therefore issued, and the petition prayed, that the former one might be superseded, on the ground that it had not been issued within the time limited by the general order.

But the LORD CHANCELLOR refused the prayer of the petition, being of opinion that an order of *supersedeas* was necessary in the first instance, and before the second commission was ordered to be sealed.

IN THE EXCHEQUER.

Michaelmas Term, November 28.

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HOLLOWAY *versus* SHAKSPEARE.
THE SAME *versus* TUFTON.

THE statutes 9 Anne, *c.* 14. *s.* 3 *and* 4. *and* 18 Geo. II. *c.* 34. *s.* 3. *do not authorise courts of equity to hold cognizance of a bill by a* common informer *for a discovery of money won at play; for the latter statute impowers the court to proceed to a decree, and a court of equity does not decree a* penalty.

HOLLOWAY *versus* SHAKSPEARE. In Scacc.

BILLS were filed in this court by the *plaintiff*, one *Richard Holloway*, a common informer, against the above defendants, praying a discovery of certain sums won by them at play contrary to the statutes in force against gaming. The defendants demurred to the bills, insisting that the answer might tend to render them liable to penalties. It appeared that the *plaintiff* was not the loser of the money, and the object of filing the bills was to enable him to bring actions against them for the recovery of the penalties. The cause, after hearing, stood over for judgment, and now the opinion of the court was delivered by

The LORD CHIEF BARON, after stating the case. "It has been insisted, on the part of the *plaintiff*, that the answer required by this bill is authorized and required by the statutes 9 *Anne*, c. 14. *s.* 3, and 18 *Geo.* II. c. 34. The first of these statutes, after directing in the second clause, that the loser of 10*l.* may sue the winner for the money within three months, and "that after that time, "if the loser do not sue, any other person may, and "may recover, with treble costs; one moiety to the in-"former, the other to the poor;" enacts, "that, for the "better discovery of the money or things so won, *and to* "*be sued for and recovered as aforesaid*, all and every the

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HOLLOWAY versus SHAKSPEARE. In Scacc.

" persons, who, by virtue of this act, *shall* be liable to be " sued for the same, shall be obliged and compellable to " answer upon oath such bills as shall be preferred against " them for discovering the sums of money, or other thing, " so won at play as aforesaid *." Provided " that upon " the discovery and *re-payment* of the money, or other " thing, so to be discovered and repaid as aforesaid, the " persons who shall so discover and repay the same as " aforesaid, shall be acquitted, indemnified, and dis- " charged from any further or other punishment, for- " feiture, or penalty, incurred by the playing for or win- " ning such money, or other thing so discovered and re- " paid as aforesaid." † The latter statute recites the former, but that " no provision is made or authority given " to any court of equity to decree the same (money or " other thing won) to be paid;" and then enacts, " that in " case any bill shall be filed in any court of equity against " any person for any sum of money won contrary to the " former act, such court, wherein such bill may be filed, " may proceed and decree thereupon, and enforce such " decree as shall be made in pursuance thereof, *in the* " *same manner as is practised in other causes* upon bills " and answers depending in the courts where such bill " shall be so brought." ‡ His lordship then took a clear and succinct view of the policy and object of these statutes, and made some observations on the very great importance of the rule, that no defendant shall be bound to criminate himself; and concluded, that it by no means appeared that the object of these clauses was to enable common informers to have a discovery, in order to sue for penalties; which would be contrary to the general principles of law, and the ordinary jurisdiction of the court; but rather to give courts of equity cognizance of a bill for discovery, at the suit of the loser, who might otherwise have no means of recovering.

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* 9 *Anne*, c. 14. s. 3. † Ib. s. 4.

‡ 18 *Geo.* II. c. 34.

That they did not apply to the case of a *common informer*, he said, clearly appeared from the clause empowering the court to proceed to a *decree*; for a court of equity could not make a decree for a penalty, by statute, to a common informer."

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HOLLIDAY versus SHAKSPEARE, in Scace.

JUDGMENT FOR THE DEFENDANTS.

CASES,

ARGUED AND DETERMINED

In the Courts of King's Bench, and Chancery,

IN HILARY TERM,

In the 44th Year of the Reign of King *George* III. A. D. 1804.

DOVER *versus* MAESTAERS.

1804.

ACTION for penalties for bribery: Venue *laid in* York: *Motion to change the* venue *to* Hull, *the* plaintiff *having some causes of action which arose in* Hull, *but being out of time to sue in a new action, and it having been his intention, originally to proceed for the offences in* Hull: *Held, that the* venue *may be changed in a penal action, where the* statute of limitations *has run, notwithstanding other causes of action,*

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DOVER versus MARSTABER.

in another county, which are still within time, but which the plaintiff *agrees to abandon.*

THE plaintiff had declared in a penal action for bribery, and had laid the *venue* in York. The declaration contained a great number of counts for offences laid there. Another plaintiff in another similar action had obtained a rule to change the *venue* from York to the town and county of Hull, as to such offences declared on as were committed in Hull, and to strike out the rest. In fact, the plaintiff had several causes of action both in the county of York, and the town and county of Hull; but as to those which had been committed in Hull, the time was elapsed to which the action is limited by the statute. It being objected that by this means, the plaintiff might proceed in actions which were not within time, but for which he had better evidence than those in Yorkshire, there being no affidavits that the causes of action were the same; this rule, after some contest, was granted by the COURT, who ordered the plaintiff to abandon the 1st, 2d, and 3d, and other counts, specifying them.

On a subsequent day in the term, the plaintiff in this cause obtained a similar rule to change the *venue*. But in this case it appeared, that the plaintiff had supposed, by mistake, that he could give evidence of acts of bribery in Hull, as well as in Yorkshire, there being some acts of bribery committed in each place, and this election being in Yorkshire. He therefore did not bring on his cause for trial at the assizes, and now moved to change the *venue*. It was endeavoured to distinguish this from the former case: but by

Lord ELLENBOROUH, C. J. "If it had never been decided that the *venue* may be changed in cases where the statute of limitations had run, the rule would have been quite as good, if not better, than at present. But it has been decided often, that where there has been no unnecessary delay the party may change the *venue* in a penal action though the time for bringing a new action has elapsed. The

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DOVER *versus* MARSTAERS.

plaintiff has agreed to abandon the causes of action which accrued elsewhere, and that appears to be some advantage to the defendant. The difficulty would have been in permitting amendments at all in such cases; but having got so far, there can be no reason for rejecting the present motion.

The plaintiff, however, agreed not to bring or cause to be brought by any person whomsoever, any other action against the defendant for the like offences.

VENUE CHANGED.

BRYAN *versus* HORSEMAN.

A BARE acknowledgment of a debt within six years is sufficient to take the case out of the statute of limitations in assumpsit. Semble. *It is so even where the acknowledgment of the debt does not raise, or* actually rebuts, *any inference of a* promise *to pay.*

BRYAN *versus* HORSEMAN.

THIS was an action for goods sold and delivered, tried before Lord ELLENBOROUGH, C. J. at the sittings at Westminster after last Michaelmas term. The demand was for 26l., for *wheat* delivered about *seven* years before the action brought. The *defendant* pleaded the statute of limitations, and a verdict was found for the *plaintiff*.

BOSANQUET, *for the defendant*, now moved to set it aside, and that a new trial should be granted. He stated, that the only evidence was that of the two persons who arrested the *defendant*. One *Searle* said, that when he applied to the *defendant*, he seemed surprised, and said that he did not owe the *plaintiff* any thing; that there were more than six years elapsed since the business was transacted.

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[Lord ELLENBOROUGH, "That testimony was not sufficient."]

One *Capell* was then called. He had some conversation with the *defendant*, at which *Searle* was not present. The effect of his evidence was, that the *defendant* said, he did not consider himself as liable. "I consider myself I do not owe Mr. *Bryan* a farthing! 'Tis beyond six years. I acknowledge the receipt of the wheat, and I paid part, and there is something due."

BOSANQUET then urged, that from the nature of the action of assumpsit, the mere existence of the debt is not the foundation of it, for it arises out of the *promise* made in consequence of the debt; and after stating the several decisions respecting promises and acknowledgments to take debts out of the statute, and the progressive changes in the opinion of the courts upon the subject, contended, that, although an acknowledgment of a debt has been held to be evidence of a promise, upon a presumption that a man who acknowledges a debt means to act honestly and to pay it, because it is due; yet, if the whole of the evidence stated above were considered, it *rebutted* all presumption of a promise to pay, and therefore fell within the distinction in *Owen* v. *Wolley* *: where it is said, that, although a *promise* is not necessary to take the case out of the statute, yet there must be an acknowledgment of a debt; and therefore, where the *defendant* said, "I acknowledge the *receipt* of the money, but the testatrix gave it me," CLIVE, Baron, held it not sufficient.

Lord ELLENBOROUGH, C. J. "*Horseman* admitted the debt was due; that was evidence to be left to the jury."

THE COURT, however, granted a rule to shew cause, and his lordship observed, that there was good sense in the distinction, that it should be *such an acknowledgment as*

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* *Buller's* Nisi Prius, 148.

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did not rebut the inference of a promise; but afterwards, before the rule was called on to be argued, Lord ELLENBOROUGH said, that the court had considered the case, and that the rule, *that the acknowledgment of the existence of a debt,* to be considered as evidence of a promise, *is a foundation* for an action of assumpsit, has been acted upon so uniformly, that the

RULE *for a new trial must be* DISCHARGED.*

WAIN *versus* BRADBURY.—*January* 28. 1804.

ON payment of money to the sheriff upon an arrest, it will be presumed that it was paid as a deposit in lieu of bail, *under the stat.* 43 Geo. III., *unless a discharge, or some acknowledgment in writing, be given to the defendant for the debt and costs. The payment of the* debt *with* 10*l. raises a strong presumption that it is* not *an absolute payment in discharge of the debt and costs.*

WAIN *versus* BRADBURY.

THIS was a rule calling upon the sheriff of Middlesex to *bring into court the money deposited in this case,* in lieu of bail, *for the purpose of being paid over to the defendant.* The *defendant* having put in bail,

EDWARD JONES, *the attorney for the defendant,* swore, that the *defendant* being arrested on a Saturday night, he went to him on the Sunday, and advised him to make a deposit, and gave orders that

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* BOSANQUET referred to most of the cases on the subject; viz. *Salk.* 28; *Carth.* 470; 2 *Show.* 126; 2 *Ventr.* 151; 2 *Burr.* 1099; 2 Term Rep. 760; *Whitcombe* v. *Whiting, Doug.* 652; *Jackson* v. *Fairbank,* 2 *H. Bl.* 340. in order to take the opinion of the court on the first motion, the defendant being a distressed man, and his lordship promised to give him the opinion of the court, if strongly against him, before the rule was called on.

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WAIN versus BRADBURY.

the sheriff's office should be searched at seven o'clock the next morning, in order that the deposit might be made as speedily as possible: that he then called upon him on the Monday, and made a *deposit* of the *debt*, and 10*l*.

The *sheriff's* officer swore that nothing was said at the time concerning a deposit, and that he received the money as *payment* of the debt and costs, and had paid it to the *plaintiff*. There was no receipt or acknowledgment in writing given on either side.

Lord ELLENBOROUGH, C. J. "As there was not any *discharge* or receipt given to the *defendant* to shew that he had *paid the debt and costs*, it must be *presumed* that the money *was paid under the act of parliament*. The sum paid *hits* the act of parliament to a *penny*; it is the *debt* and the 10*l*. And I think that something like this should be understood, '*that it will be presumed, that the money was taken under the act, unless a discharge is given, or something to shew that the money is not paid under the act; in order to prevent it from being converted into an engine of great oppression.*

ERSKINE, *for the sheriff and the plaintiff*, observed, that the *defendant* did not swear to merits.

LAWRENCE, J. "That is not necessary, where money is paid as a deposit, and you claim it as *absolute* payment."

Lord ELLENBOROUGH, C. J. "This has been *sometimes* erroneously called *my* act. The truth is, I altered *these clauses* a little, and made them less mischievous than otherwise they would have been. But I am afraid they are productive of more mischief than good after all."

RULE ABSOLUTE.*

* At the first opening of the case, the COURT suggested that the *plaintiff*, being the party interested, should be brought before the court, and the rule would have stood over till it had been served on *him*, as well as the sheriff, had not ERSKINE consented to appear for *both*. GARROW and ANDREWS were for the defendant.

MOUNTFORD *(Administrator of* HOLLOWAY*)* *versus* GIBSON *and* Another.—*Same day.* 1804.

A CREDITOR *of* B. *having sold goods to him in his life-time, obtains them back again from his wife, after his decease, in part satisfaction of his debt, and before administration granted;* C., *another creditor, takes out administration, and brings trover for the goods against* A.: *Held, that this single act of the wife does not make her* executrix de son tort, *so as to convey a title to the goods to* A. *although she may be charged as* executrix *in an action against her.*

MOUNTFORD *versus* GIBSON.

THIS was an action of *trover* for twenty tons weight of iron and steel, tried before LAWRENCE, J. (on the Oxford circuit), at the last summer assizes. The *defendants* had sold goods (the iron and steel in question) to the intestate in his life-time, which were delivered to him shortly before his death; and afterwards the wife re-delivered these goods, which were worth about 160l., to the *defendants*, who were creditors to the amount of 170l. The *plaintiff*, another creditor, afterwards took out letters of administration, and brought the present action to recover the value of the goods. At the trial, after the case had been opened by WILLIAMS, Serjt., the fact of the possession was not denied; but the wife of the intestate was examined *for the defendants*, in order to shew that the *plaintiff* had been satisfied of his debt. It was then urged by MILLS, *for the defendants*, that the wife was *executrix de son tort*, and that a delivery of the goods by her to the *defendants*, even if it made her liable to the rightful executor, yet conveyed a title in the goods to the *defendants*, being in payment of a lawful debt.

LAWRENCE, J., however, considered the *defendants* themselves as the executors *de son tort*, and therefore held that they could not retain for their own debt, and that the *plaintiff* was entitled to recover; and the jury found a verdict accordingly.

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A rule was obtained to shew cause why this verdict should not be set aside, and a new trial granted.

MILLS *and* JERVIS, *for the defendants,* were now called upon by the COURT.—"The *widow* of the *debtor* returned the goods to the *defendants,* as creditors, who would otherwise have had a charge upon the estate *pro tanto;* as this, therefore, was in satisfaction of a just debt, she would have been entitled to have set it up in defence to an action against her; for, if an actual *executor de son tort* pays the *bonâ fide* debt of the intestate, the *rightful* executor cannot object to it *."

[Lord ELLENBOROUGH, C. J. "Did she do any *other* act as *executrix de son tort?*"]

In answer to this, it was stated from the bar, that the wife had taken out letters of administration, and had acted for half a year as administratrix, before the *plaintiff* became *executor*; but LAWRENCE, J. observed that it was not proved at the trial; and no statement of that fact, nor any thing from which to infer more than this single act of intermeddling with the intestate's goods, appearing upon his report, the case proceeded as if there had been no such proof.

JERVIS then cited *Read*'s case †, and *Parker* v. *Kett* ‡, and also *Toller's Law of Executors,* to shew that a rightful act done by executor *de son tort,* will bind the rightful executor; and therefore, if an executor *de son tort* pays 100l. of the testator's in a bag to a creditor, the rightful executor shall not have trover and conversion against the creditor; which, he said, was exactly the present case. He then cited several cases to shew that a single act of intermeddling with the goods of the intestate constituted any one executor *de son tort,* and that, in actions against him, he is declared against, and considered as executor §. And he argued, from *Buller*'s Nisi Prius, 48, that although the *plaintiff* would be entitled to nomi-

* 12 *Mod.* 471. 1 *Sid. Baker* v. *Berrisford.*

† 5 *Co.* 33, *b.* and 34, *a.* ‡ 1 *Ld. Ray.* 661.

§ *Dyer,* 166.

nal damages in trespass, yet he must be nonsuited in trover."

Lord ELLENBOROUGH, C. J. (stopping WILLIAMS, Serjt. and WIGLEY, *contrà.*) "Almost all the propositions which have been stated in the argument are true and indisputable; but I do not admit that they have properly any application to the present case. A solitary act of wrongful intrusion and intermeddling with the property of the intestate, though it may constitute the person by whom it is done an *executor de son tort*, to make him liable in an action against him in that capacity, for his own wrong, yet is not sufficient to constitute him an administrator, so that his acts are to be considered as *valid*. That is the case put in *Carthew*, 104, *(Whitehall* v. *Squires)*, which is a very valuable and learned decision. That was an action for the very horse of the intestate which the *plaintiff* had *himself* delivered to the *defendants*; and the Judges, who differed from *Holt*, did not differ on the principal point, but thought that the action would not lie between those parties, because the *plaintiff* was a party to the *tortious* act himself, and *particeps criminis*. Now we should see if this were not to obtain, namely that the *executor de son tort* shall be answerable in damages to the rightful *executor*, that there would be a general scramble amongst all the creditors.—They would have no chance of being satisfied in a due course of administration, because the property is insufficient; but they would put a *beggar* into the house as *executor de son tort*, and say to him, *hand* out to *us* our goods; to another, his goods, and thus they would get into their possession all the property of the deceased. When it is said that an executor *de son tort* may pay lawful debts, or give goods in satisfaction, it must be understood with the distinction, that he may not, by any means, set off a payment to himself in diminution of damages. The authority cited by *Buller*, J. does not authorize what is said. It refers to *Carthew*, which is directly against it. I can find no proposition in law, nor no principle in reason, to support the claim to the goods by the *defendant*."

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GROSE, J. "We have now before us this question only, Whether the wife, delivering goods to the creditor, becomes *thereby* an *executrix de son tort*, so as to justify that delivery of the goods, and entitle him to the possession of them against the rightful executor? To hold so would be a very dangerous proposition. *Read*'s case at first, perhaps, seems to say as much; but it goes, in reality, no further than to say, that she is so when she has been acting ostensibly as executrix. Suppose goods were *delivered* by a servant, a jewel for instance, or any thing of value, perhaps to the amount of 1000*l*.; it would not be *sufficient* for me to look to the servant and bring an action against her as *executrix de son tort*. Yet this case falls exactly within the same principle; and I cannot adopt what is said in 5 *Coke*, 33 *a*, and 34 *b*., without this limitation being added, that it must be of a person *acting* in a *course* of administration. I think the direction of my brother LAWRENCE was therefore proper, and that the rule must be discharged."

LAWRENCE, J. "At the trial of the cause, I understood that all the facts of the case were stated in the opening. I understood it to be put upon this plain point, '*that if any person took under his disposition any goods, and gave them to another person, he became by that act* executor de son tort, *so as to convey a title*.' I will not say that I then considered all the difference which might have arisen upon other facts being proved. This is a case, where a creditor applied soon after the death of the intestate, and got the goods in satisfaction for his debt. Upon trover against the executor *de son tort*, what he has lawfully paid is to be *recouped* in damages; and the reason given is, that *before* the creditors have such payments made to them, they have some reason to think that the person from whom they receive them is the lawful executor. It has been said by Mr. WIGLEY, that the *defendant* here is the *executor de son tort*, and so I think *he* must be considered. It is said by Mr. JERVIS, on the other hand, that the creditor need not look further than to the person *before him, acting* as executor, when the act is done. I do

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not understand the cases so. I think the cases mean that he must look to a person who *has* acted as an executor in other things. It is also said in this case, that if the action here had been against the *wife*, this would be *recouped* in damages. But in *Graysbrook* v. Fox*, "*A.* made his will, and appointed an executor, and "died. The ordinary, without notice of the will, com- "mitted administration to *I. S.* before the executor had "proved his will. The administrator sold the goods of the "deceased, and the executor afterwards proved the will, "and brought *detinue* for the goods against the ven- "dee, and it was adjudged that he should recover†. But "it is said it would be otherwise, if he had averred that "the rule was to discharge the funeral expences, or debts "which the administrator was compellable to pay." I do not therefore mean to say how it would have been had the action been against the wife, but only that we must not be concluded by admitting it. The reason given for establishing the payment of money to creditors by an executor *de son tort*, is because the executor has a *colour* of authority. But that does not apply here, because she has no colour of authority. Then it is said that the rightful executor is not prejudiced. But here he would be prejudiced, for if he got possession of the goods, he would be entitled to retain for his own debt; and *Wentworth (Office of Executors*, 182.) says, that this payment should stand against other creditors, but not against the rightful executor, because it would take from him the right of paying himself; and in 2 *Blackstone's Commentaries*, 508. it is said, that 'though against the rightful executor or administrator he cannot plead such payment, yet it shall be allowed him in mitigation of damages, *unless perhaps*, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt.' I cannot altogether agree, therefore, with the doctrine broadly laid down, though I do not say that what is

* 18 *H.* VI. *Plowden's* Commentaries, 275.

† 18 *H.* VI. *Vin.* 215. xi.

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laid down supports the case of the *defendant*.—Of the same opinion."

LE BLANC, J. "If in fact the situation of the parties is different from what appears on the *report* we must regret it; but we can only take it, as appearing at the trial, that *this* is the *very act* constituting the wife *executrix de son tort*. The action is brought, by a person having title, against one who received the goods from a person not having title; and cases have been cited to shew that the payment of a debt by an *executrix de son tort* binds the executor: but I do not think this applicable to the case as stated. It is to be collected from the cases, that the *defendants* may set off what has been *rightfully* paid. That I understand to mean what has been paid in the same manner as another who is a rightful executor would have paid it: for the law will not allow persons to take advantage of that which they have done in their own wrong. But still they must be allowed those payments against which neither they nor the lawful executor could have had a defence. The answer of the *defendants* here is, we have received the goods from a person who *had* no right; but it should have been, according to the cases cited, that they had received them from a person who *appeared* to have a right, and against whom they might have proceeded to recover their debt as *executrix de son tort*. The wife here, I think, could not have protected herself against the *plaintiff*'s claim; and neither shall the *defendants*, who are parties to a sort of fraud, by which they connive at her taking the goods, in order that they themselves may get possession of them.

RULE DISCHARGED.

RIGHT *(on the Demise of* HEIRD*)* *versus* SAUNDERS.— *January* 27. 1804.

A TESTATOR expresses his intention of disposing of his estate, *real and personal, and devises freehold* estates *at* A. *to* E. S.—*And to* M. S., *a manor and farm at* L., *and lands and tenements at* S. *and at* S. G., *"which two last are freehold," charged with several annuities. The estate at* L. *is leasehold for lives. And,* in order that the lives of the estate at *L.* may be kept duly filled up, *he gives* 400*l. for the purpose of renewing on his decease; and directs, that if any life should drop during the life of the annuitants, then if* H., *son-in-law to* M. S., *will renew, he shall* have the full moiety of the said estate, *and the remaining moiety, after the decease of* M.S., *to be divided between her sons and daughters; and, if* H. *does not fill up the life, either of* them, *who shall renew, shall have the full moiety of the* said estate, *after the annuities charged upon* IT *are paid; and if neither renew, then the* lands *and* tenements *at* S., *and the* lands and tenements *at* S.G. *to be sold, and a renewal made with the purchase money; and if the said* M.S. and H., *or whoever shall be in possession of the* SAID ESTATE, *shall pay* 400*l. to* A. W., *the annuity chargeable to her of* 25*l. (one of those charged on the freehold also) shall cease: Held, that the grammatical construction of the will must prevail, and* H. *upon renewal is* not *entitled to the full moiety of the freehold lands, but only of the leasehold* estate *at* L.

EJECTMENT for a moiety of several messuages, tenements, and gardens, in *Sidbury*, in the parish of *St. Peter*, Worcester, tried at the summer assizes, 1803, before LE BLANC, J. Verdict for the *plaintiff*, subject to the opinion of the court, on the following case: RIGHT *dem.* HEIRD *versus* SAUNDERS.

George Wingfield, esq. being seized in fee of the whole of the premises in question, and of the after-mentioned tenements, in *Swineshead*, in the county of *Worcester*; and also seized of and entitled to the manor and farm of *Leopard*, also mentioned in his will hereafter stated, which he held *under lease* from the *Dean* and *Chapter* of *Worcester*, to him, his heirs, and assigns, for the lives of himself *G. B.* and *M. P.*, *and the longest liver of them*,

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by his will duly executed for passing real estates, dated December 24, 1776, after directions as to his funeral, devises as follows: and after all my just debts are discharged, I give and dispose of my estate, real and personal, as follows: *imprimis*, to my cousin, Captain *Elliott Salter*, and the heirs of his body lawfully begotten, I give and bequeath my freehold estates, at *Butwell*, *Eastburnham*, and *Dirney*, now in the possession of *Richard Teesey* and *Lionel Salt*, subject nevertheless to an annuity of 100*l*., to be paid quarterly, to my dear wife *Ann Wingfield*, during the term of her natural life, clear of all taxes and deductions whatsoever; and that in case the said quarterly payments shall be behind or unpaid for the space of 21 days after either of the days on which the same ought to be paid, (the first payment to be made the first calendar quarter day which shall happen after my decease); that she shall have by her attorney full power to enter upon the premises, and make seizure of the same, and indemnify herself for such expence. *Item.* I give and devise to my cousin *Mary Saunders*, of *Market Lavington*, *Wiltshire*, my manor or farm of *Leopard*, in the parish of *St. Martin*, in the county of Worcester, held upon lives under the Dean and Chapter thereof, together with some lands at *Normeadow*, in the parish of *Tiberton*, in the same tenure, and also my lands and tenements at *Sidbury*, in the city of *Worcester*; and also my lands and tenements at *Swineshead Green*, in the same county, *which two last are freehold*. All which afore-mentioned premises are subject nevertheless to the following annuities or rent charges, namely, to my dear aunt *Blanch Thomas*, of Worcester, the annuity of 100*l*., to be paid her quarterly during the term of her natural life, by even and equal portions, free of all taxes and deductions whatsoever, and this to be in lieu of the annuity of 90*l*., which I am under contract and obligation to pay her; and also to a further annuity or rent of 25*l*. to my dear wife *Ann Wingfield*, to be paid her in like manner; and in case of failure of payment for 21 days after either of the quarter days on which the same ought to be paid,

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the same annuity shall have full power to distrain on the whole or any part of the premises for the same, and reimburse themselves all expences attending thereof; and in order that the *lives upon which the estate of Leopard is held may be kept duly filled up*, I furthermore give and bequeath to my said cousin *Mary Saunders*, the sum of 40*l.* of lawful money, for her to renew with the said *Dean* and *Chapter*, as soon as possible after my decease, which I desire my executrix to see duly performed; and my will further is, that in case any or either of the lives should drop, after mine has been so filled up, during the lives of either of the annuitants above-mentioned, that the same may be with all expedition filled up; in order, for which, if Mr. *Heird*, son-in-law to the said *Mary Saunders*, will immediately renew with the said *Dean* and *Chapter*, *then he shall have the full moiety of the said estate upon such renewal, and the remaining moiety, after the decease of his said mother-in-law, to be divided equally between her sons and daughters*, share and share alike; and that in case the said Heird, upon such life falling, should not immediately fill up the same, then, if either of the sons or daughters of the said *Mary Saunders* shall renew the life, he or they renewing to have the full moiety of *the said estate*, after the annuities, *charged as above, upon it*, shall be paid; and in case neither of the said sons or daughters shall renew upon a second life's dropping, then my will is, *that the lands and tenements in Sidbury, and the lands and tenements at Swineshead Green*, above mentioned, shall be sold for the best price they will fetch, and the renewal with the Chapter to be immediately made with the money arising from the sale of the same; and furthermore, if the said *Mary Saunders*, —— *Heird*, or whoever shall be in possession of *the said estate*, shall at any time be desirous of paying my said wife *Ann Wingfield* the sum of 400*l.*, the annuity chargeable to her, of 25*l.* shall immediately cease upon the said sum being paid her. The testator afterwards gives

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several pecuniary legacies, not material to the question, and appoints his wife executrix.

The *testator* died in August, 1785, seized of and entitled unto such estates as aforesaid, without altering or revoking his said will. Soon after his death, Mrs. *Saunders* renewed the then existing lease, with the 400l. left for that purpose; and accordingly, on or about the 23d November, 1785, a fresh lease was granted by the *Dean* and *Chapter* of *Worcester* of the *Leopard* estate to the said Mary Saunders, to hold to her, her heirs, and assigns, for and during the lives of the Rev. Gibbon Bagnal, Martin Pearkes, and John Hoper, and the life of the longest liver of them; and she died intestate, as to her real estate, in the year 1787; Mrs. *Ann Wingfield*, the testator's wife, is still living; *Blanch Thomas*, the testator's other annuitant, died in the testator's life-time; and one of the *cestuis que vie* died about the 24th of December, 1800; whereupon Mr. *Heird* immediately renewed the lease of the *Leopard estate*, for which he paid 660l.; and on the 12th of March, 1801, a lease of the *Leopard estate* was granted by the said *Dean* and *Chapter* to him, to hold to him, his heirs, and assigns, for the lives of *M.P.*, *J.S.*, and *T. S.*, in the usual form. The net annual value of the leasehold, about the time of the death of the testator, was about 240l.; it is now of the net annual value of 300l., but was valued, on the part of the *Dean* and *Chapter*, at 330l. *per annum;* upon which valuation the renewal was granted at the rate of two years value. The value of the freehold is about 51l. *per annum*.

The question for the opinion of the court is, Whether the said *John Heird*, the lessor of the *plaintiff*, is entitled to a moiety of the freehold tenements *in Sidbury*, mentioned in the will; if he is, then the verdict to be entered for the *plaintiff;* if not, then for the *defendant*.

WIGLEY, *for the plaintiff*. "The lessor of the plaintiff is entitled to a *moiety* of the lands *in fee*. The leasehold lands are out of the question. *Mary Saunders* took either an estate *for life* or *in fee;* it is in the present case imma-

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terial which; and at her death the lands descended, as the case may be, whether she took in fee or for life, either to her heirs or the heirs of the devisor. Then upon the death of one of the *cestuis que vie* of the estate at *Leopard*, *Heird*, her son-in-law, is to fill up the lives, and is to have *the full moiety* of the said estate *upon such renewal; and the remaining moiety, after the decease of his said mother-in-law, to be divided equally between her sons and daughters, share and share alike.* The word *estate*, here, passes the *freehold* land, for the whole is given, in one sentence, in the beginning of the devise, to *Mary Saunders*, as one *estate*, and *all* the *premises* are charged with annuities of 100l., 90l., and 25l.; and in the power of renewal, given to the sons and daughters, they are to have the full moiety of the said *estate*, after the annuities charged upon *it* are paid; and *Mary Saunders*, *Heird*, or whosoever is in possession of *the said estate*, may discharge the annuity of 25l. upon payment of 400l. to the *testator*'s wife. The will is also introduced with the words, "after all my just debts and funeral expences are paid, I give and dispose of my *estate* real and personal." From all which it is to be inferred, that the words, *a moiety of the said estate*, include the freehold as well as the leasehold. The fine for the renewal might amount to more than the moiety of the leasehold was worth; and the testator could never intend *Heird* to be a loser by his bounty; and he must have considered the fine to be large, as he leaves 400l., for the purpose of renewal, to his wife. It is unnecessary to cite cases to shew, that where the devisee is to pay a sum of money out of his own funds, he is entitled to the fee."

LAWRENCE, J. "Having enquired the value of the three lives, which were estimated at sixteen years, observed, that in that case the devisee was in no danger of being injured, for he was to pay *two years purchase* for that which was worth *eight* at the least."

JERVIS, *for the defendant.* "The reversion in fee, after the death of *Mary Saunders*, descends upon the heir at law of the testator. Introductory words are not sufficient

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of themselves to disinherit the heir. *Denn* v. *Gaskin*;* *Wright* v. *Russel*; † *Right* v. *Sidebottom*.‡ Here there is not even that presumption against the heir, which would arise from connecting the devise with the introductory words of the will. The whole turns upon the meaning of the word *estate*, which, throughout the will, is used in a *limited* sense, as descriptive of the locality of the lands, excepting in the introductory clause. Notwithstanding the charges of the annuities, both upon the leasehold and freehold, there is nothing to give *Heird* the same title, upon performance of the condition, as to the freehold, which he is to have as to the leasehold; and the object of the power of renewal was to keep up the leasehold estate for the purpose of paying the annuities. The words, *full moiety*, are introduced not with any reference to the freehold lands, but to give *Heird* the full moiety, in addition to that share which *he* would have in the other *moiety* as the son-in-law of *Mary Saunders*. And there are no words in the will to give the freeholds to the persons making the renewals, though there is an express devise of them to *Mary Saunders*."

WIGLEY, *in reply*, observed, that the leasehold, subject to the annuities, might not be worth the money to be paid, and cited *Baddeley* v. *Leppingwell*§, to shew that the words, *paying out of the estate*, gave a fee.

Lord ELLENBOROUGH. "He was to have his election, whether he would pay the fine for the renewal, as a consideration for the thing devised to him, if he thought it worth so much. It is really a matter of *grammatical* construction rather than of *legal* argument. The whole question turns upon the *meaning* of the words *said estate*, in that part of the will, where the moiety is devised to *Heird*, upon condition of paying for the renewal of one life. Were it not for the words in the introduction, there could be no

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* *Cowper*, 662.
† *Ibid*, 661.
‡ *Dougl.* 730.
§ 3 *Burr.* 1533.

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difficulty as to the meaning of the word *estate*. In the introductory clause, the testator uses it in a *general* sense, but except that once, in all parts of the will he uses it in a limited sense, meaning only the part of his estates which he then devises. Here it is *estate* in the singular number. When he speaks of the freehold, he calls it either *freehold* estate, as in the devise to Capt. *E. Salter*, or lands and premises, as in the devise to *Mary Saunders*. He adds there also, "which two last are freehold;" and, in the charge of the annuities, he uses the words *all which aforementioned premises*, as *nomen collectivum*; meaning the leaseholds, and the two lands which are freehold. Then comes the devise in question—in order that the lives, upon which the estate of *Leopard* is held, may be kept duly filled up. This estate was worth 330*l.* *per annum*, and the whole of the freehold was worth only 51*l.* *per annum*. The main object, therefore, was to have *this estate* kept up, as the means of sustaining the annuities. For this purpose he contemplates the fine to be paid, and he provides for the renewal, and gives a moiety of *the said estate* to the son-in-law of *Mary Saunders*, if he will renew. The moiety of what said estate? The estate to be renewed. That is the *bonus*, and it is sufficient; for it is a moiety, upon payment of the *renewal* of one life. And if he *(Heird)* does not renew, then if any of the sons and daughters of *Mary Saunders* shall renew, he, or they renewing, to have the full moiety of *the said estate*. So anxious is he that *this estate* should be *kept up*, that he first provides a fund of 400*l*, for that purpose, for *Mary Saunders*; he then enables her son-in-law to renew; then her sons and daughters; and then provides, that the lands and tenements at *Sidbury*, and the lands and tenements at *Swineshead Green*, shall be sold. It is remarkable too, that when he speaks of *these* separately, he considers them as lands and tenements, and it is only when speaking of them generally in the introduction, that he speaks of them as *estates*." His lordship concluded, that under this will, made *inops consilii*, the heir at law was

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entitled, unless disinherited by clearer words, or a more plain implication than appeared upon the will; and that therefore the lessor of the plaintiff was only entitled to the moiety of the leasehold estate."

GROSE, J. "I have had some difficulty in the course of the argument as to the proper construction of this will. Without, however, violating the general sense of the words used, I cannot say that the moiety of the *Sidbury* estate was intended to go to *Heird.* I feel, indeed, considerable difficulty, for I fear the intention of the testator was *otherwise.* Here he uses the word *estate* in the singular number; and he does so in the beginning of the will, when he proposes to devise *all* his *real* and *personal estate*; but that would weigh little. By the words, *full moiety of the said estate,* it is doubtful whether he means only the moiety of *Leopard estate*; for if the renewal was not made, it was to go to the sons and daughters of *Mary Saunders,*—'they renewing to have the full moiety, after the said annuities above charged shall be paid;' and these were charged upon the freehold also; but they were to have *one* moiety, share and share alike, without renewing; and he meant to give to the sons and daughters of *Mary Saunders* all which he meant to give to *Heird.* I am not, however, inclined to say that if he meant to give more than the leasehold he has used sufficient words to convey that intention; and if a testator does not use words to express his meaning, the estate must go to his heir at law."

LAWRENCE, J. "I do not deny the principle, that the land should go to the person liable to pay the annuities. But I cannot find words to controul the grammatical construction of the words *the said estate.* The introductory clause is satisfied by the subsequent disposition which is made of the real and personal estate. In the devise to Capt. *Elliot Saunders,* the testator gives freeholds, expressly using the word *estates* as descriptive of the lands. Then follows the devise to *Mary Saunders,* in which the freehold is specified, and is charged, as well as the leasehold, with the annuities. He is desirous that the annuities should be

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secured during the life-time of the annuitants, because he is bound to pay one of them 90l. His object is to provide for this; and he devises to *Heird*, merely for the purpose of filling up the lives upon which the estate of *Leopard* is held. He gives 400l. to *Mary Saunders* to do this at his own death; and he cannot then mean any thing but the estate held on lease. The words *said estate* afterwards must mean the estate so to be filled up. With great deference to the doubt expressed by my brother GROSE, I do not think the mention of the charge, '*after the annuities charged upon it as above*,' can shew that he means any thing more than the leasehold, or give a right to the freehold, on account of that charge; for they *were* charged upon both before, and would be so although the moiety of the leasehold had not been left upon condition, to *Heird*, and the sons and daughters of *Mary Saunders*. All that is to be understood from it is, the testator says, *I do not mean, by the devise of the said moiety, that I should affect the annuities to* Blanche Thomas *and the others*. I am therefore of the same opinion with his lordship."

LE BLANC, J. expressed himself of the same opinion, and observed, that there was no devise over to any one.

POSTEA TO THE DEFENDANT.

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Beale versus Thompson.
Johnson versus Broderick.

A SEAMAN, detained in Russia *under the late* embargo, in 1800, *who is permitted by the captain to return, and serve on board upon being taken off the embargo, is entitled to wages, during the time he was on shore and absent from the ship by force thereof; his contract being for the voyage, and to do his best endeavour for the ship, and not to neglect or to refuse to do his duty by day or night, nor go out of the ship on board any other vessel, nor be on shore under any pretence without leave, under the penalties of* 2 Geo. II. c. 36, *and* 37 Geo. III. c. 73; *and twenty-four hours absence, without leave, to be deemed a total desertion.*

Capture, even hostile, does not defeat the right to wages, where the captors, instead of proceeding to condemnation, release the ship, and thereby pronounce that their act is not a valid *seizure.*

Beale versus Thompson.

IN Error from the court of Common Pleas.—Assumpsit for wages due to the *plaintiff* as a mariner on board the ship *Aquilon*, on a voyage from the port of Hull to Petersburgh, and from Petersburgh to London, at 5l. 10s. *per* month, *from the time of his entering into the service* of the *defendant* until the final *end and completion of the said voyage*. The declaration alleged the safe arrival of the *Aquilon* at Petersburgh, and her return from thence to London; and that during the whole of the said voyage *the plaintiff continued and remained in and on board the said ship in the service of the said* defendant *as such mariner*, and ship's cook, as aforesaid. There were also counts for wages as a seaman, on a *quantum meruit*, and for money paid, laid out, and expended, for money had and received, and on an account stated. Plea, the general issue. The record then set out the *postea*, and that a special verdict was found before Lord *Alvanley*, C. J. at the Westminster sittings after Michaelmas term, 1803, as follows:—The *plaintiff*, a British seaman, on the 8th day of September, 1800, executed articles to serve as

a seaman in a British ship, called the *Aquilon*, of which the *defendant* was owner, at the wages of 5l. 10s. *per month*, on a voyage from *Hull* to *Petersburgh*, and from thence to *London*; and that in consideration of the said monthly wages, the *plaintiff* should and would perform the above-mentioned voyage; and the *defendant* did hire the *plaintiff for the said voyage* at such monthly wages, to be paid pursuant to the laws of Great Britain. And the *plaintiff* did *promise and oblige himself to do his duty and obey the lawful commands of his officers on board the said ship, or boats thereunto belonging, as became a good and faithful seaman and mariner, and at all places, where the said ship should put in or anchor at, during the said voyage, to do his best endeavours for the preservation of the said ship and cargo, and not to neglect or refuse doing his duty by day or night, nor go out of the said ship on board any other vessel, or be on shore under any pretence whatsoever, till the voyage should be ended, and the ship discharged of her cargo, without leave first obtained of the master, captain, or commanding officer on board*; and in default thereof it was agreed, that he should be liable to the penalties mentioned in the 2 *Geo.* II. c. 36, and 37 *Geo.* III. c. 73.; and further, *that twenty-four hours absence, without leave, should be deemed a total desertion*, and render the *plaintiff* liable to the forfeitures and penalties contained in the acts above recited; and also, that the *plaintiff* should not demand or be entitled to his wages, *or any part thereof*, until the arrival of the said ship at the above-mentioned port of discharge, and her cargo delivered; and that if the *plaintiff* should well and truly perform the above-mentioned voyage, he should be entitled to the wages or hire that should become due to him, pursuant to the said articles. The *plaintiff* accordingly sailed on board the said ship, which arrived at Petersburgh on or about the 18th of October in the same year, and continued there in prosecution of the purpose of the voyage, until the 5th of November; on which day the following order was issued by the Russian government: "Whereas we have learned that the island of Malta,

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lately in the possession of the *Hercule*, has surrendered to the English troops, but as yet it is uncertain, whether the agreement entered into on the 30th of December, 1798, will be fulfilled, according to which this island, after its capture, is to be restored to the Order of *St. John of Jerusalem*, of which his *majesty*, the *emperor of all the Russias*, is grand master: His Imperial majesty, being determined to defend his rights, has been pleased to command that an embargo shall be laid on all English vessels in the ports of his empire till the above-mentioned convention shall be fulfilled." In consequence thereof guards were placed along the shore to prevent the crews escaping from their respective ships until the 10th of the same *month of November*, when such part of the crew of each ship, as were British subjects, were taken out by a Russian guard, and marched into the interior of the country. *On the 18th and 21st days* of the said month of November, the following proclamation appeared in the Petersburgh court gazette. "The crews of two English ships, in the harbours of *Narva*, on the arrival of a military force to put them under arrest, in consequence of the embargo laid on them, having made resistance, fired pistols, and forced a Russian sailor into the water, and afterwards weighed anchor and sailed away; his *Imperial majesty* has been pleased to order, that the remainder of the vessels in that harbour shall be burned. His *Imperial majesty*, having received from his chamberlain *Stalinskoi*, at *Palermo*, an account of the taking of *Malta*, has been pleased to direct that the following note shall be transmitted to all the diplomatic *corps*, residing at his court, by the minister presiding in the *college* for foreign affairs, count *Rostopskin*, and the vice-chancellor, count *Panin*. His majesty, the emperor of all the *Russias*, has received circumstantial accounts respecting the surrender of *Malta*, by which it is actually confirmed, that the English generals, notwithstanding the repeated remonstrances on the part of his majesty's ministers at *Palermo*, as well as from the ministry of his *Sicilian majesty*, have taken possession of *Valetta*, and of the island of

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Malta, in the name of the *king of Great Britain*, and have hoisted his flag only. *His Imperial majesty*'s just indignation having been raised by this violation of good confidence, he has resolved not to take off the *embargo* that has been laid on all English vessels in the *Russian ports*, until the agreement of the convention, concluded in 1798, shall have been completely carried into execution." On the 14th of January, 1801, his Britannic majesty in council issued the following order: "Whereas his majesty has received advice that a large number of vessels, belonging to his majesty's subjects, have been and are detained in the ports of Russia, and that the *British sailors*, navigating the same, have been and are detained as prisoners in different parts of *Russia*; and also, that during the continuance of these proceedings, a confederacy, of a hostile nature, against the just rights and interests of his majesty and his dominions, has been entered into with the court of *Petersburgh* by the courts of *Denmark* and *Sweden* respectively: his majesty, with the advice of his privy council, is thereupon pleased to order, and it is hereby ordered, that no ships or vessels, belonging to any of his majesty's subjects, be permitted to enter and clear out for any of the ports of *Russia*, *Denmark*, or *Sweden*, until further order: that a general embargo or stop be made on all *Russian*, *Danish*, and *Swedish* ships and vessels whatsoever, now within, or which hereafter shall come into any of the ports, harbours, or roads, within the united kingdom of Great Britain and Ireland, together with all persons and effects on board the said ships and vessels; but that the utmost care be taken for the preservation of all and every part of the cargoes on board any of the said ships and vessels, so that no damage or embezzlement whatever be sustained: and the right honourable the lords commissioners of his majesty's treasury, the lords commissioners of the Admiralty, and the lord warden of the *Cinque Ports*, are to give the necessary directions herein as to them respectively appertain." On the 15th of January, 1801, his Britannic majesty in council issued the following order: "Whereas his majesty has

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received advice that a large number of vessels, belonging to his majesty's subjects, have been and are detained in the ports of Russia, and that the property of his majesty's subjects in Russia has, by virtue of several orders and decrees of the Russian government, particularly one bearing date the 29th day of November, old style, (corresponding with the 10th of December, new style,) been seized and directed to be applied, in violation of the principles of justice, and of the rights of the several persons interested therein, his majesty, with the advice of his privy council, is thereupon pleased to order, as it is hereby ordered, that no bills, drawn since the said 29th day of November, old style, (corresponding with the 10th of December, new style), by or on behalf of any persons being subjects of or residing in the dominions of *the emperor of Russia*, shall be accepted or paid without licence from one of his majesty's principal secretaries of state, first had in that behalf, until further signification of his majesty's pleasure, or until provision shall be made in respect thereof by act of parliament, whereof all persons concerned are to take notice and govern themselves accordingly." The captain and crew of the *Aquilon*, including the *plaintiff*, remained up the country till the 28th of May in the succeeding year, during which time they were kept within certain bounds, and from the time they were taken from their ships, were treated in other respects as if they had been prisoners of war. On the 28th of May, in the succeeding year, the said captain and crew were marched back to Petersburgh, and returned on board the ship, and afterwards proceeded on the voyage to London; the ship went out to Petersburgh, in ballast, to bring a cargo to London, and was to be paid freight for that cargo by the ton. The *plaintiff* did his duty as a seaman on board the ship during the said voyage, and the ship received the same freight as if she had been detained, and no more. After the captain and crew returned on board the ship, the Russian government issued the following order:

" Quoique l'intention magnanime de S. M. l'empereur de toutes les Russies, de rendre pleine et entiere

justice aux sujets Britanniques, qui ont essuyés des pertes pendant les troubles, qui ont alterés la bonne intelligence entre son empire et la Grande Brétagne, soit deja constatée par les faits, S. M. I., ne consultant que sa loyautè, a authorizé encore le plénipotentiaire soussigné, à declarer, comme il declare, par la presente; que, tous les navires, les marchandizes et les proprietés des sujets Britanniques, qui avaient èté mis en sequestre, sous le dernier, regne, en Russie, seront, non seulement fidélement restitues aux dit sujets Britanniques, ou à leurs commettans, mais que pour les effets qui auroient èté alienés, d'une maniere quel-conque, et que ne pourraient pas être rendus en nature il sera accordé aux proprietaires un equivalent convenable, lequel sera determiné ulterieurement d'apres les regles de l'equité. En foi de quoi nous, plenipotentiaire de S. M. I. de toutes les Russies, avons signé la presente declaration et y avons fait opposer le sceau de nos armes. Fait a St. Petersbourg, le $\frac{5}{17}$ Juin, 1803. (Signé)

"Le Comte de Panin."

This order has not yet been carried into complete effect. No new articles were entered into between the captain and crew. The *plaintiff* has received all his wages for the voyage according to the articles of 5l. 10s. *per* month, except for the time the captain and crew were so kept out of the said ship.

The court of Common Pleas gave judgment for the *defendant*, but Lord *Alvanley*, C.J. was of opinion for the *plaintiff*; and thereupon these writs of error were brought, which were argued in last Michaelmas term, with great ability, by Lens, Serjt., and Gibbs, in one case; and by Gaselee and Giles, in the other. The first argument went very much upon the same topics, as had been before discussed in the Common Pleas;* and the court, therefore, in the second case, requested Lens, Serjt., and Gibbs, to consider principally the terms of the contract, and whether the service under it was duly performed; which they accordingly did; and now the opinion of the court was delivered as follows by

* 3 *Bos.* and *Pull.* Reports, *Beale* v. *Thompson.*

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Lord ELLENBOROUGH, C. J. "This case, in the discussion which it has undergone in the court of Common Pleas, and in the arguments here, has been treated as depending upon this question, namely, Whether the acts on the part of the Russian government, by which the relative situations, rights, and interests of these parties were affected, were to be considered as amounting to an actual capture or temporary detention. It has been assumed, on all hands, that capture dissolves contracts for freight. Whether it is so when the capture is not merely *inchoate*, but perfect, and when the right is not restored by recapture, or by any judgment or authoritative act of restitution, it is not necessary now to decide. Lord *Mansfield* has settled that question in the case of *Hamilton* v. *Mendez* *. But *Molloy* † says, 'If a ship on her voyage is taken by an enemy, and afterwards recaptured, and restitution made, and she proceed on her voyage, the contract is not determined.' Lord ELDON, in *Bergstrom* v. *Mills* ‡, says, 'If the voyage is performed, a temporary interruption shall not defeat the claims of seamen.' And in *Pratt* v. *Cuff*, cited in *Thompson* v. *Rowcroft* §, where there had been a *capture of the ship, and detention for seven months, and she was* afterwards *released*, and the owners received freight for the whole voyage, Lord *Kenyon* was of opinion for the *plaintiff*, and he recovered his wages during the seven months of his imprisonment. In the case of the *Friends*, in *Robinson*'s Reports, vol. iv. p. 144, the doctrine, 'that capture revives the right, seems admitted, and the *dictum* of Lord C. J. *Eyre*, in *Curling* v. *Long*, is the only authority to the contrary. I am aware of no case, where a ship has been seized in the way of *hostile* reprisal, or *with a view to retaliation*, if necessary to enforce such measures as a government wished to carry into effect, (and such seems to be the description of this act)—I am not aware, I say, of a case in which,

* 2 *Burr.* 1198.

† Lib. 2. c. 4. s. 13.

‡ 3 *Espinasse*, Ni. Pri. Ca. 37.

§ 4 *East*, 34. 2 Law Journal, 415.

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when a ship has been seized, and then the seizure renounced and abandoned, it has been considered as *captured. Seizure,* even hostile seizure, is not necessarily *capture.* It is so, in its usual and probable result; but, by subsequent proceedings upon it, the ultimate act of a state assigns its proper quality to its own original proceeding. If it condemns, it is capture, *ab initio;* if it restores, it pronounces on its own act as not being a valid capture. And for this purpose it seems to make no difference whether *restitution* is awarded as an act of state, or by the ordinary courts of civil judicature. Having stated that we are of opinion that the acts in question, though originally of an hostile aspect, cannot have the effect of capture; and having assumed that capture would dissolve the contract, yet these acts are not sufficient for that purpose. If the *plaintiff,* therefore, be not defeated on the above grounds, it is next to be considered whether he can be defeated on any other. The right of a mariner to wages depends on carrying a *freight* in the *service* he has *agreed* to perform. Let us apply this to the case: *First,* the *freight* must be earned to the owner.—In this case the *whole freight,* for the specific voyage, was earned and *received.* The ship *Aquilon* went to *Petersburgh,* and was to be paid freight; she was paid the same freight as if she had not been detained. This freight was of course freight for the voyage, unless the contract was put an end to on the only ground on which it could be determined, namely capture. Freight, therefore, having been specifically earned, the only remaining question to be decided, to perfect the claim of the *plaintiff,* is, Has his *service,* as a seaman, been duly performed? The service agreed for, appears, by articles signed, to have consisted in the *plaintiff*'s obeying the lawful commands of the captain as a good and faithful seaman, using his best endeavours for the preservation of the ship and cargo, and not neglecting his duty day or night, nor being on shore till the ship was discharged of her cargo, under the penalties of the act of 2 *Geo.* II. c. 36., and 24 hours absence, *without leave,* being deemed a total desertion. It then provides, that no wages shall be demanded till the ship's arrival in the port of discharge, and

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her cargo be delivered; and that if she perform her voyage the *plaintiff* shall be entitled to wages. The question is, Did the *plaintiff perform* the *service* he stipulated for or not? The special verdict answers the question; namely, that he did his duty as a seaman during the voyage; that he was guilty of no disobedience of orders; that there was no omission of his best endeavours for the preservation of the ship and cargo. And, indeed, no neglect of duty, or refusal to obey the commands of the captain, is suggested; nor is it pretended that he went on board any other ship or vessel. The *last* and only remaining question is, Whether he was on shore under any pretence before the voyage was ended; and under this head it is material to observe, by reference to the articles, and by 2 *Geo.* II. c. 36. and 37 *Geo.* III. c. 73. that being on shore means a departure from the ship by the unauthorized act of the party. The words of the statutes, and of the articles, in every form of the expressions used, import a departure by his own act, and by no means apply to a man taken out of a ship by a Russian guard, by which way alone it can be contended he was ever on shore. But if it was more questionable whether he incurred a breach of his articles, surely his being received on board, as soon as the master was in a condition to avail himself of his services, and the mariner to offer them, if it does not amount to a waiver of his services during the absence, and a discharge from the contract is only not a waiver, because it is not expressly found as a fact; as it would if it had been expressly left to the jury. But as the fact stands on the face of the special verdict, his returning on board the ship, and proceeding on the voyage as soon as the master and mariners went on board, does, in the absence of any fresh contract, form a recognition that he and the captain stood in the relative situations to each other, which they had done at the commencement of the voyage. This doctrine is familiar in those cases in which questions of this sort most frequently arise. I mean in the session cases, as in *the King* v. *Castleton*, 1 *Burr.* 70. and *the King* v. *Eaton*, ib. 48. In the same way the receipt of a landlord for rent imports, that the person to

whom it is given is tenant. Upon the whole of this case, and without adverting to the convenience or inconvenience, which might arise from a different construction than the one we put upon it, it appears to us that the contract between the *plaintiff* and the *defendant* is to be considered as being in force from the commencement to the final termination of the voyage; and that the *plaintiff* is entitled to recover wages for the whole time; and accordingly, that the judgment of the court of Common Pleas must be reversed."

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JOHNSON *versus* BRODERICK.

Lord ELLENBOROUGH. "This case is similar to the last, except that the *plaintiff* is a foreign seaman. This makes no difference."

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THE JUDGMENT, *in both cases,* REVERSED.

THE KING *versus* DOWLEY.—*February* 1*st and* 6*th.*

A VOLUNTEER enrolled under an offer of service, referring to the acts 34*th* Geo. III. *c.* 31. *and* 42*d* Geo. III. *c.* 66., *may resign at pleasure, notwithstanding the provisions of* 43 Geo. III. *c.* 121., *or any other statutes previous thereto.*

THIS was a conviction against the *defendant* upon the 43 *Geo.* III. c. 121. s. 14., before *Peter Broadley,* Esq. a magistrate for the county of *Surrey,* removed by *certiorari* into this court.

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The conviction set out the information, which alleged, that before, and at the times, &c. there was a certain corps of volunteer cavalry, *called the Southwark volunteer cavalry, otherwise the Southwark gentlemen and yeomanry, otherwise the Southwark troop of volunteer cavalry,* duly formed and established, whose offer of service had been duly accepted by his majesty,

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according to the form of the statute in such case made and provided, to wit, &c. That every member of the said corps, upon his being enrolled a member thereof, signs a written engagement, amongst other things, to be on horseback, to be exercised, at such times and places as the commanding officer shall appoint; that the *defendant* was, before the commission of the offences hereinafter mentioned, to wit, on the 4th of August, 1803, duly elected a member of the said corps, and thereupon signed such written engagement as aforesaid, and continually from thenceforth, and at the time of committing the offences after-mentioned, and of exhibiting the information, was a member of the said corps, duly enrolled as aforesaid: that after the *defendant* was enrolled as such member as aforesaid, and before the commission of the offences hereinafter mentioned, or any of them; to wit, on the 25th day of October, 1803, at, &c. *John Collingdon*, Esq. then being commanding officer of the said corps, did order and appoint that the said corps should be in Hyde Park on Friday then next, being the 28th day of the same month of October, at eight o'clock, the hour of muster to be at half past six precisely, opposite the Asylum, St. George's Fields; and that, &c. [*the information here contained other orders which respected drills and musters.*] That after the said *defendant* was so enrolled as aforesaid, to wit, on the 25th of October, 1803, the said corps did duly make and form, amongst other rules and regulations, the rules and regulations following: that is to say, that every gentleman, who does not muster on Friday next, at the hour appointed, meaning the said 28th of October, shall be fined 10s. 6d.; that on the master being called (drill mornings) any one who does not answer to his name shall be fined. [*Here the fines were set out.*] That no excuse be allowed but illness, certified by Surgeon *Davie*, or leave of absence from the commanding officer. Of which said order, hereinafter-mentioned, the said *defendant*, being a private in the said corps, had notice. And that in pursuance of the said order of the said commanding officer, the said corps did muster on the 28th of October, opposite

the Asylum, at half past six, and did march from thence to Hyde Park to be reviewed. *Nevertheless the said* defendant, *not regarding his duty in that behalf, did not attend the said muster, or the said review,* but then and there wholly omitted and neglected so to do, he the said *defendant* not being prevented from so doing, or having any excuse for such non-attendance by illness, certified by Surgeon *Davie,* in the said rules and regulations mentioned, or having leave of absence by the commanding officer of the said corps. By reason whereof the *defendant* forfeited 10s. 6d. for his neglect. The information then stated other neglects, and the forfeitures thereupon, amounting in the whole to 1l. 4s., which were demanded by the informant (the secretary of the corps), but that the *defendant* refused to pay them, and every part thereof was then wholly due and unpaid. By reason whereof, and by force of the statute in such case made and provided, the said *defendant* had forfeited the further sum of 3l. 8s., being double the amount of the penalties so by him forfeited for such neglects and absences as aforesaid. Wherefore the informant prayed that he might be convicted, &c. Whereupon the *defendant* was summoned on the 17th of December, 1803; and he appeared, and pleaded not guilty. The information then set out the hearing of the complaint. Whereupon the said *defendant* freely admitteth and confesseth all and singular the matters and things in the said information contained, to be true, *except that he the said* defendant *continued to be a member of the said corps at the time of the making of the rules and regulations respecting the said fines, in the said information mentioned, or at the times of the non-attendance of him the said defendant,* in the said information mentioned. On which point the following facts are admitted and agreed upon between the informer and the *defendant;* that is to say, that the said corps was originally formed and established, and their offer of service accepted by his majesty in the year 1798, in pursuance of an act of parliament, passed in the 34th year of the reign of his present majesty, intituled, "*An act for encouraging and disciplining such*

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corps, or companies of men, as shall voluntarily enrol themselves for the defence of their counties, towns, or coasts, or for the general defence of the kingdom during the [THEN] *present war.*" That after the passing the act, in the 42d of his present majesty, intituled, "*An act to enable his majesty to avail himself of the offers of certain yeomanry and volunteer corps to continue their services;*" and in the month of August, 1803, the said corps agreed to continue their services; and upon such agreement every member signed a *muster roll*, containing the following written engagement:

"*We, whose names are undersigned, do severally pledge ourselves to be faithful to the constitution of this realm, as by law established, in king, lords, and commons, and do severally agree to engage ourselves in the troop of Southwark volunteer cavalry, under the command of Captain* John Collingdon, *and to appear on horseback to be exercised at such time and places as the commanding officer shall appoint. And we do further promise and agree to comply with the rules and regulations hereunto annexed; and also with the acts of parliament of 34th and 42d of* Geo. III. *for the encouragement and discipline of such corps and companies of men as shall voluntarily enrol themselves for the defence of their towns and coasts, or for the general defence of the kingdom. As witness our hands, the 4th of August,* 1803."

That the said *defendant* was duly enrolled as a member of the said corps, and signed the said muster roll, with the said rules and regulations annexed thereto, on or about the 4th of August, 1803; *that he was a private in the said corps, and was so at the time of the several non-attendances in the said information mentioned, if under the circumstances hereinafter stated he is to be considered as then being a member of the said corps:* that the renewed offer of service of the corps was made to his majesty on the 17th of August, 1803, and accepted on the 22d of the same month: that a committee was duly appointed, pursuant to the 3d of the said rules and regulations, which proposed the rules and regulations respect-

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ing fines in the said information mentioned, to a general meeting of the corps, held on the 25th of October, 1803, for their adoption, and the same were accordingly adopted and agreed to by the corps at such general meeting: that on the 23d of September, 1803, before the making the last-mentioned rules and regulations, the said Capt. *Collingdon* caused to be delivered to the several members of the said corps, and, amongst others, the said *defendant*, who was then a private in the said corps, the following letter, which was received by the said *defendant*, on the 24th of the said month.—[Here followed the letter, which concluded with stating, that "any gentleman, who does not attend one of the morning drills, and also Thursday in every week, *for one month* to come, will receive his dismissal."]

That the following letters [*stating them*] afterwards passed between the said Capt. *Collingdon* and *Thomas Dowley*.

The conviction then stated, that the said *Thomas Dowley* did, by the letters above-mentioned, notify his intention to the said Capt. *Collingdon* to discontinue his services in the said corps, and did resign his situation in the said corps, as far as in him lay, and if by law he might. That the *defendant* had not in any manner acted as a member of the said corps, since the writing of the said letter of the 24th day of September; nor had the said Capt. *Collingdon* agreed to accept his resignation, but on the contrary thereof had constantly refused so to do. That the name of the said *defendant* had not at any time been struck off from the said muster roll, but still continued thereon, and no further or other evidence was produced, or given before the said justice, by either of the said parties; nor did the said *defendant* shew any further cause why he should not be convicted of the premises charged upon him in and by the said information, &c.

It was now moved to quash the conviction.

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ERSKINE, *for the defendant*.* "The objection to this conviction is, that the *defendant*, before the time of committing the offences alleged against him, had ceased to be, and was in fact not any longer a member of the corps, he having previously notified to the commanding officer his intention of discontinuing his services therein. The magistrate does not even leave the court to put a construction upon the facts stated in the conviction, whether *they* amount to a *resignation* by the volunteer or not, because no man can make a resignation, if this is not one. He does not leave it ambiguous, but states as a fact, 'that the *defendant* did by the letters notify his intention to the said captain to discontinue his services in the said corps, and did resign his situation in the said corps, as far as in him lay, and if by *law* he might.' The question is therefore now freely before the court, not as a question, whether *any* volunteer can resign, because that may depend upon the nature of his particular engagements, but, Whether a person, under an engagement of service, referring to the statutes 34 *Geo.* III. c. 31., and 42 *Geo.* III. c. 66., has the right of resigning at will. How then does parliament, in the several statutes passed on the subject, consider this? The first, now subsisting, is the 42 *Geo.* III. c. 66. The

* This case, being put in the paper for a *concilium*, was considered as being within the rules respecting special arguments, and the party making the objections was entitled to begin. Some difficulty occurred at first, in settling this rule of precedence. GARROW, GIBBS, and ANDREWS, were of council with ERSKINE, *for the defendant*; and GASELEE, with the ATTORNEY-GENERAL, *for the plaintiff*. On special arguments, it is usual for the juniors to argue alone, and the seniors are not called upon, unless a second argument is required by the court. But this being a case of great general interest, at the time, and the seniors having given opinions upon it, in the most public manner, it was thought proper that they should take the argument upon themselves; and the juniors did not even offer themselves to the court.

king by the constitution has no power to grant commissions to volunteers without an act of parliament to enable him, and this statute was passed for the purpose; and, in consideration of their services, it granted exemptions from the militia. But the 4th section of this statute is conclusive, to shew that the engagements of the volunteers were not absolutely binding and compulsory, for it contains words expressly recognizing the right of resignation, since in the very muster rolls, a return is to be made *of any person 'who, since the date of the last muster roll, shall have notified to the commanding officer his intention of discontinuing his service therein, in order that, from the date of such resignation or discharge, they may become liable to serve in the militia,* as if they had never been exempted at all. And thus the exemption is co-extensive with the service, but it is still with a reliance upon the honour of the volunteer only for the continuance of the service. This is also to be collected from the *N. B.* in the schedule A. 'of those who have *quitted* since the last muster roll.' The statute 42 *Geo.* III. c. 82.*, or Army of Reserve Act, is framed on the same principle. This contains also several exemptions, which are wisely limited to corps which government have means of knowing are in a probable state of discipline, or are making progress in the acquisition of it. The exemption is in the seventh section, '*as long only as the individual shall actually continue to belong to, and serve in the corps entitled to exemption.*' To require an obligatory service would be productive of the greatest inconvenience. When a military body is provided by the country for its own defence, the government gives something for its services, and, if it would possess them exclusively and compulsorily, must provide the armed force with subsistence and cloathing. But here the government provides nothing. The party may become a bankrupt, and be unable to provide himself, or he may remove to another part of the country, and be unable to attend the

* *Vide* Law Journal, No. VII. vol. ii. p. 17.

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corps. In this very case both partners in the defendant's house of trade are in different corps, both of which to exercise on the same day, and this is the cause of his re signing. Some persons have servants whom they send t serve in these corps, and supply with cloathing. If the remove, or if they discharge their servants, then either th servants must have the right of resignation, or they mus remain incapable of their own support, and a burthen t the parish, which must provide them with the means o continuing in the corps. The binding of volunteers to com pulsory service is against all reason. This indeed is t be admitted on the former acts, but it is to be said, th the act 43 *Geo.* III. c. 96, takes away the right of resig nation. If it does so, it has taken it away without makin the volunteer a party to the act, and without even holdin out a previous hint, or any room for suspicion, of its ob ject, and thus the volunteer is unsuspectingly drawn int a toil, which can hardly be deemed consistent with th justice of parliament; and therefore a strong presumptio arises that it cannot have done so." [Here he examine the several clauses of this act, and pressed the argu ments which are stated in his opinion, already published to which, as it is impossible to put them more concisely we must refer our readers. " By the 43 *Geo.* III. c. 9 the whole population of the country between the ag of 17 and 55, are included in a compulsory lev subject to certain exceptions, which are extremely wi They extend to the chief officers of the crown, t judges, &c. (by sections ten and eleven), and amongst othe to persons serving as *effective* members in a corps of v lunteers (by section 12). The legislature, far from doubti the voluntary services of the people, in the 52d section, e ables the king to call out the compulsory force, and t Lord Lieutenants are directed to cause the proportion f each county to be embodied, unless the number of volu teers *under this act* shall be sufficient for the purpose; b that applies only to such volunteers under this act.* A

* For a full examination of this clause, see vol. ii. p. 567.

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then the fifty-third section enables his majesty to dispense with the compulsory levies when volunteers are raised to a certain number, but this and the fifty-fourth section apply to volunteers under this act, who 'are liable to be embodied, and to serve for the period, in the manner and on the conditions before mentioned, in relation to other persons liable to military service under the act.' As far as regards the volunteers under previous acts, it enacts nothing more than was in force before; and (so long as a person shall remain an *effective* member of such a corps of volunteers,) he is by the 12th section exempted from its operation. In this case the volunteer made his engagement to serve previous to this act, which did not pass till the 27th of July, 1803. The words *effective member*, in this and the next statute, 43 *Geo.* III. c. 121, are inconsistent with any thing but a voluntary engagement, for, in a compulsory force, there is no such distinction of effective and non-effective members.

[LAWRENCE, J. here asked, whether a sick man in the regulars might not properly be called a non-effective member?]

"In the 43 *Geo.* III. c. 121. the 42 *Geo.* III. c. 66, is recognized to be in full force, both in the preamble, and in an express clause, s. 3, which provides that nothing in that act, and the 42 *Geo.* III. c. 66, shall be altered, except as expressly altered thereby. And then having declared in the eighth section, that 'whereas there is no authority to prevent even drummers and serjeants from quitting the yeomanry and volunteer corps raised under those acts;' it enacts, 'that in case of invasion, or the appearance of an enemy, &c. all corps of volunteers shall forthwith assemble, &c. and shall be liable to march *according to the terms of service*; and all persons not then joining their corps, shall be liable to be punished as deserters.' Here the parliament is faithful to its engagements, and considers the *terms of service* as still the *criterion* of the volunteer's duty, and the limit of the claim which the country has upon him. But, upon

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the other construction, suppose a man had sent in his resignation, then from the moment of doing so, he would have lost his exemptions, and if he had been ballotted must have been sent to the militia, where he must serve; and yet when the corps is called out he would be a *deserter* for not attending, when his being in the militia prevented him; and might be shot for not being in two places at once."

THE ATTORNEY GENERAL, *contrà*. "The question is properly narrowed to the right of the volunteer to resign. Two of the topics of argument for the defence may be considered as popular prejudices, which it is of importance to remove in the outset; namely, first, the inference. This *ex vi termini*, from the word *volunteer*, is supposed to be inconsistent with a compulsory engagement; but it is not so. A man may be a *volunteer* in taking upon himself an engagement which afterwards becomes strictly obligatory upon him. The act of submitting to the engagement is the only voluntary act, and is properly called *volunteering*; but that once submitted to, the party acts no longer as a volunteer. The other topic of prejudice is, that it is supposed, that the volunteer had, by the former acts, the right of resigning, and it is held out, that, if that right is taken away by any subsequent act, government has been guilty of a breach of faith. In answer to this, I deny, that by rendering the service of the volunteer permanent or compulsory, there has been any breach of faith. For even, under the first acts, though the volunteer could not be punished for resigning, and might break his faith with impunity, yet he had properly no right to resign; and all that the subsequent statutes have done, is to enforce a right to the permanent service of the volunteer, which existed before, but which there was no mode of enforcing. Thus the 43 *Geo.* III. c. 121, has in many respects altered the nature of the service as to the volunteer who has not resigned; and the question is now, whether it applies to one who has attempted to resign? By s. 9. he is *obliged* to *come out* upon invasion, which he was not before. The 42 *Geo.* III. c. 66,

s. 10, only said, that those who should *voluntarily* march should receive pay. Now this alteration of the service was not a hard measure, but an indulgence to the volunteer. For the pressure of state, necessity had, in the meantime, produced the act of the 43 *Geo.* III. c. 96, which called forth the military service of all the nation between the ages of 17 and 55; and there was no injustice in adding something of compulsion to the engagement of the volunteers, when the whole of the country, besides, was subjected to a compulsory levy. It leaves the volunteer still many advantages. It only compels him to perform the services which he has engaged himself to perform. In consideration of these he is exempt from the compulsory clauses of the act, under which he would be compelled to be drilled, and be liable to penalties for non-attendance; he might even have been sent into any regiment of the line, the militia, or other corps, at his Majesty's pleasure. At present he is only subject to the orders of his own corps, and he cannot be separated from it. The resolutions are, 'subject to be called out in case of invasion agreeable to the 42 *Geo.* III. c. 66.' That statute certainly left it voluntary to him to come out or not. But after the 43 *Geo.* III. c. 121, the engagement clearly is to serve under the terms of that act, which are, that all shall come out, and consequently that none shall resign. There is a distinction between those who engaged before the 43 *Geo.* III. c. 96, and those who engaged afterwards; and also a further distinction between those who engage to serve any where, and those who engage only for their own county. I contend, that the defendant, when called upon, must march wherever he is ordered, and then he falls under the 43 *Geo.* III. c. 96; but if not, and his service is confined to *Southwark* and its *environs*, then he falls within the 43 *Geo.* III. c. 121. It is asked, on the other side, what is the nature of a volunteer's offer of service independent of the statutes. I say an offer to serve, in case of invasion, if accepted, binds the volunteer to the per-

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formance of the duty when invasion happens. He undertakes only to do this, but to do it effectually he is bound to his country and his comrades, to prepare and fit himself for effective military service; and there is a great distinction between the right to resign, and the having the power to do it with impunity. I admit, that under the 42 *Geo.* III. c. 66, volunteers had the power to resign, and therefore if they would exercise it, that act makes them subject to the militia, and the 43 *Geo.* III. c. 96, does not impose any further compulsion upon them, but c. 121 does. Now this is not an *ex post facto* law, for it only compels the performance of a duty which existed before. The tenth section of this act imposes military law upon volunteers to be assembled on an invasion. As to the word *non-effective* raising any implication in favour of the right of resigning, the non-effective man is still a member of the corps, and the term is introduced only with a view to narrow the exemptions. The 43 *Geo.* III. c. 96, s. 10, has the words 'persons *serving* in the volunteers;' and the twelfth section, '*enrolled* and *serving* as effective members.' This is not in case of the volunteers, but restrains the exemptions only to such persons *enrolled and serving*. Under the compulsory clauses, the volunteer was not to come out unless he chose; but this gave him no right to quit, it only provides, that if he gives notice not to serve, he shall no longer have any exemption. The 43 *Geo.* III. c. 56, s. 8, even shews, that the legislature then thought that volunteers were liable to be called out. There is no doubt that volunteers, under the 43 *Geo.* III. c. 96, are bound and compelled to perform the services under that act, and the act deals with other volunteers in the same way in section fifty-two. It was upon estimating the number of these persons that the king was to dispense with the compulsory levy. This section looks to both sets of volunteers, though the constables, in taking down the names, are to distinguish such as would serve *under* that act. The fifty-third section certainly applies only to volunteers under that act; but

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It must be observed, that in former acts, as in 42 *Geo.* III. c. 66, where exemptions are given, &c. the volunteers are spoken of as volunteers '*serving*,' or '*enrolled* and serving;' here it is only 'volunteers enrolled,' which shews that the legislature then depended on their services as compulsory, from the first inrolment. If they were not bound to serve when inrolled, the king would have given up the compulsory levy for nothing, for these men might all desert three days before an invasion, and it would be too late to call out and *train* the levy *en masse*. The 43 *Geo.* III. c. 121. s. 9. has no bearing upon the subject. The object of it is not to prevent serjeants receiving pay from deserting, but to prevent them from quitting the corps *and entering into the militia*.[1] Here it may be observed, that the term *volunteer* comprehends both a man receiving pay, and one who is compelled to serve. For these men are compelled; and why are they alone, of all volunteers, made so, while the rest are left free? By the 2d clause of this act, the volunteer, after having attended musters for a certain number of days, is to remain exempted from being balloted to any additional force, 'until he shall have resigned,' but 'until he shall be struck out of the muster-roll for non-attendance or desertion.' The words in the schedule, referred to on the other side, '*quitted* since the last muster,' apply to such as have actually *quitted*, by being raised from the ranks, or who have been struck out. Then by the ninth section of 121, all who are '*enrolled* under any act of this session' shall be liable to march according to the terms of service. This includes all the volunteers retrospectively as well as prospectively. As to the argument,

[1] The words are, "whereas great inconvenience has been found to arise to the volunteer service, from their being no authority to enforce *military discipline* among the serjeants, &c. receiving pay, and to prevent them from quitting such corps, and enlisting into the forces, &c."

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that a person who has resigned, and been sent int the militia or army of reserve, would be liable to be sho as a deserter, for not going out with his corps, th would never happen, because the entering into t militia would, immediately, absolve him from his du as a volunteer." He concluded with observing, th though his construction of the statutes considered t volunteer as bound, and he thought it necessary for t benefit of the state, yet, were he in parliament, assisti in the making of the laws, and not in a court of justi arguing for their true construction, he should not ev insist upon it, if it could be shewn that any persons h even mistakenly become volunteers, upon a supositi that they were not bound.

THE COURT, it being late, prevented ERSKINE fro replying that day, and on a subsequent day, witho hearing him in reply, the opinion of the court was de vered to the following effect, by

Lord ELLENBOROUGH, C. J. " It will perhaps b matter of public convenience, if the court pronoun judgment immediately, and as the court are unanim in their opinion, it will be unnecessary to trouble M ERSKINE for a reply. In this case the question appe to lie in a very narrow compass. It is to be decided the facts as they appear on the face of the convicti which may, or may not apply to any other case. I this, like every other case, is to be governed by its o circumstances. The terms and conditions upon whi the volunteer engaged to serve, are to be found eit in the words of that engagement, or in the terms the statutes, 34 *Geo.* III. c. 31, and 42 *Geo.* III. c. 66, which the regulations refer. The rules and regulati are silent, as to the period for which each member of corps agreed to serve, and nothing upon the subject is be collected from the statute, 34 *Geo.* III. c. 31. But 42 *Geo.* III. c. 66, recognizes the right of the volunt to resign, if he thinks proper, by the reference which makes to the intentions of members to discontinue th service. It directs, on such resignation (which impl

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the power to resign), that if the person, that is the person so resigning, shall have been drawn for the militia, his exemption shall cease, and that he shall be liable to serve as a supernumerary, if it shall happen that there is no vacancy when he resigns. The agreement, therefore, of the corps to continue their services under this act necessarily supposes the right of each member to notify his resignation according to the act; and it is next to be seen, whether that power is taken away by any subsequent statutes. The statute 43 *Geo.* III. c. 96. speaks of two descriptions of volunteers, namely, volunteer corps, formed with the approbation of his majesty previously, and volunteers under that act. The latter are composed of a description of persons whom the constables return as willing to serve as volunteers under the act. That act enables the king to call out his subjects to be trained and exercised, and provides, that if the persons who should engage to serve as volunteers amount to a certain number, and such persons agree to be trained and exercised, and marched to any part of the country, subject to such conditions, as to the number of men, and other rules and regulations, as to his majesty should seem necessary, the operation of that act is to be suspended. [Here his lordship read the provisions of the act, sect. 53.*] On non-compliance with these conditions, the provisions of that act are to be carried into effect. Nothing is here said as to the period of service. All that is necessary to authorize the suspension of that act is, that a sufficient number of volunteers shall have agreed to be trained and exercised. If they do not come forward, then the *levy en masse* is to go on, but the mere suspension of the execution of that act does not authorize the imposing of terms upon the volunteers, which have not been originally agreed to or expressed. The 54th section does, indeed, speak of a period of service; but the description of persons to whom it refers, is of those who

* *Vide* Law Journal, vol. ii. p. 38.

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are named in that act, and who were liable, *and engaged to serve as volunteers under that act*. It is wholly silent as to the volunteers under former acts accepted by the king, upon their own voluntary offers. The statute 43 *Geo.* III. c. 121. also leaves that point untouched; it only relates to the members of such *corps* as shall have continued their services; it has no retrospective view to those who have resigned and ceased to be volunteers. The 14th section of that act seems, indeed, somewhat to justify the inference, that the volunteers have no right to resign, for it was of little avail, as a mode of enforcing attention to discipline, to have imposed fines and directed the mode of recovering them, if the persons to whom they attach may immediately get rid of their liability by resigning. However, neither the inference to be drawn from this section, or from any other of the acts, nor the scope and object of the whole system, appears sufficiently strong to warrant the court in saying, that the express power of resignation by volunteers (not restrained by their original agreement) is restricted or taken away. The court are therefore of opinion, that the *defendant* was competent to exercise the power of resignation, and that having exercised that power by resigning, which, if by law he might do it, has been admitted on all hands, he was not a member of the corps at the time of the fines being imposed.

THE CONVICTION QUASHED.

THE KING *versus* the Inhabitants of NEW WINDSOR.—*January* 27.

RULE obtained, on affidavit by several persons, inhabitants of a parish, to shew cause why a presentment against the inhabitants should not be discharged, &c.: This rule being discharged with costs, the court granted an attachment against these persons for non-payment of costs of the rule, and not against the inhabitants.

THE KING *versus* the Inhabitants of NEW WINDSOR.

THIS was a presentment by *John Slingsby*, esq. mayor, and one of the justices of the peace for the borough of New Windsor, in the county of Berks, upon his own

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view, at the general quarter sessions for the said borough, against the inhabitants of the parish of New Windsor, for not repairing a road in that parish, which presentment was afterwards removed into this court, by writ of *certiorari*, and the defendant suffered judgment to go by default thereon. In Michaelmas term last, an application was made to the court, upon affidavits stating the road to have been sufficiently repaired, to discharge the presentment passing a small fine on the defendants, when a rule to shew cause was granted, which was afterwards discharged with costs.

On the first day of this term, COURTHOPE applied for an attachment against the inhabitants for not paying those costs, upon an affidavit of a demand having been made on several of the inhabitants, and on the attorney employed to obtain the former rule, but it not appearing that the persons of whom those costs had been demanded, were any of the parties who made the affidavits to obtain that rule, the court refused to grant the writ; yet Lord ELLENBOROUGH intimated, that if a demand was made on those persons, the court would, upon an affidavit of that demand, assume that they were part of the inhabitants mentioned in the indictment, and would attach them.—COURTHOPE being now prepared with such an affidavit, moved for an attachment against *Henry Proctor*, and two others, who appearing to be the persons that made the application to discharge the presentment,

THE COURT ordered the writ to issue accordingly.

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PAINE *versus* DREW.—*November* 11*th*, 1803; *and February* 8*th*, 1804.

A COMMISSION of sequestration issued out of the court of Chancery, upon a decree directed to certain commissioners, to enter upon all the lands, &c. of C. S. *and to take into their hands not only the rents, &c. but all his goods, &c.* " *and detain and keep the same under sequestration till he shall have paid the sum therein mentioned:*" *subsequent to this, a writ of* fi. fa. *against the goods of* C. S. *was delivered to the Sheriff to be executed; whereupon he seized the goods, and made an inventory, but he was afterwards told that the goods were under sequestration, and returned* nulla bona: *The plaintiff in the writ of* fi. fa. *brought an action for a false return, and upon a case reserved, without any fraud being found by the jury, and on admission that the sequestrators had not taken possession of the goods, and that the sequestration had not been laid on previous to the return of the* fi. fa.: *Held, that the sheriff was bound to levy the goods; for although, upon application to this court, or to the court of Chancery, the sheriff might have been relieved at the time of executing the writ, if there were any difficulty; yet it does not appear that the court of Chancery would have proceeded against him for a contempt, in disregarding a sequestration which had not been laid on.*

Semble. *It is rather a contempt in the sequestrators not to inforce the commission directed to them.*

Semble. *A sequestration after decree can at most be considered equivalent to a common law execution.*

PAINE *versus* DREW.

THIS was an action against the *defendant* as sheriff of *Dorsetshire*, for a false return of *nulla bona* to a writ of *testatum fi. fa.*, sued out on a judgment against *Charles Sturt*, esq., for 227l. 10s., which was tried at the spring assizes for Dorsetshire, 1803, before Mr. Baron THOMPSON and a special jury, and a verdict was found for the plaintiff for 227l. 10s. subject to the opinion of the court, on the following case:

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The *defendant* was *sheriff* of the county of *Dorset*, at the sung out and return of the writ in question.

The *judgment* was regularly obtained for the *plaintiff* against *Charles Sturt*, in *Michaelmas* term, 1801, for 227*l.* 10*s.* and a *testatum fi. fa.* was sued out into Devonshire, on the 28th of November, 1801, returnable on *Saturday* next after eight days of *St. Hilary*, 1802. There were sufficient goods of *Charles Sturt*, at his house at *Brownsea*, in the *defendant*'s bailiwick, at the time of the entry of the officer under the *fi. fa.* in the month of *January*, 1802, and they were taken possession of, and an inventory made thereof by him; but the *sheriff* afterwards quitted possession, and made a return of *nulla bona*, in consequence of the *sequestration* hereinafter mentioned.

In the year 1790, a bill had been filed against *Charles Sturt and others*, in the *court of Chancery*, by *Henry William Portman*, esq. and others; and after answer was put in, and other proceedings, an order was made by that court on the 17th of *March*, 1800, for the payment of 2000*l.* by the said *Charles Sturt* to *Humphrey Ashley Sturt*. That sum being unpaid, an order *nisi*, for a commission of sequestration to issue, directed to certain commissioners, to be therein named, to sequester the said *Charles Sturt*'s personal estate, &c. was made on the 5th of *May*, 1800, which was made absolute for a sequestration, on the 13th of June, 1800. A writ of sequestration under the great seal, was issued on the 17th of June, 1800, dated on that day, and was shortly after delivered to the sequestrators therein named. The writ of sequestration is in the following words: George the third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. to John Mills, William Dean, John Robinson, and William Castleman, &c. [*Here the commission recited the orders as above*]. "Know ye therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give to you, any three or two of you, full power and authority to enter upon all the messuages, lands, and te-

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nements; and real estates whatsoever, of the said *Charles Sturt, and to take, collect, receive, and sequester into your hands,* not only the rents and profits of the said messuages, lands, tenements, and real estates; but also *all goods, chattels, and personal estates whatsoever:* and therefore we command you, any three or two of you, that you do, at proper and convenient days and hours, go to, and enter upon, all the messuages, lands, and tenements, and real estates of the said *Charles Sturt,* and that you do collect, take, and get into your hands, not only the rents and profits of the said real estate; but also all his goods, chattels, and personal estates, and *detain and keep the same under sequestration* in your hands, till the said *Charles Sturt* shall have fully paid the said sum of 2000*l.* to the said *Humphrey Ashley Sturt,* and cleared his contempt, and our said court make order to the contrary. Witness, ourself at Westminster, the 17th day of June, in the fortieth year of our reign."

ARDEN SEWELL.

On the 18th of November, 1800, another order of the said court was made, which directed certain annuitants therein named (*Ishabed Wright, Francis Bereisford,* and *Francis Evans*) to pay a certain sum therein mentioned, to *H. A. Sturt,* and directed that they should have the benefit of the sequestration. On the 17th of January, 1803, by an order of the court of Chancery, of this date, stating an application to the Lord Chancellor, by counsel, for *Ishabed Wright, Francis Bereisford,* and *Francis Evans;* it was alledged that *Humphrey Sturt,* deceased, by his will, devises his estate to his son *Charles Sturt,* for life, subject to certain charges therein: and after testator's death a suit was instituted for the purposes of carrying into execution the trusts of the will, and by an order made the 17th of March, 1800, it was ordered, that *Charles Sturt* should pay to *H. A. Sturt* 2000*l.* in part of a larger sum reported due to him; but the said *Charles Sturt* not having complied with the said order, the said *H. A. Sturt,* on the 5th of May, 1804, obtained an order, that a commission of sequestration should issue, to se-

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quester the personal estate of the said *Charles Sturt*, and the rents of his real estate, unless cause shewn within eight days; and, no cause being shewn, absolute, and a commission of sequestration issued on the 10th of June, 1800, directed to Mr. Wm. Dean, Wm. Castleman, John Mills, and John Robinson, who entered upon the estate of the said *Charles Sturt*, for his life, and sequestered his personal estate; and the said sequestrators received 1900*l.* part of the rents of the personal estate. The said *Charles Sturt* had, in the year 1793, granted to the said *Wright*, *Bereisford*, and *Evans*, an annuity of 2400*l.* charged upon his estates before mentioned. The annuitants had been let *into* possession of the estates, and were *ousted* of that possession by the *sequestrators*, under the authority of the said order, and under the authority of another order, dated the 8th of July, 1800, whereby the tenants were ordered to *attorn* to the *sequestrators*; the said annuity being greatly in arrear, and the annuitants conceiving that the possession of the *sequestrators* would not prevent their making a distress on the personal estate for their arrears, they accordingly made two distresses at *Brownes* and *Critchill*, and Mr. *Dean*, one of the *sequestrators*, signed acknowledgment of possession on the back of the notices and inventories of distress, whereby he acknowledged that he held possession of the goods distrained, for the purposes of a distress. A considerable part of the effects distrained being *heir looms*, they were replevied by the trustees under the testator's will. That in *Michaelmas term*, 1800, the parties to the said suit and the sequestration, conceiving that the annuitants had not power to have made a distress, applied by motion to the court, and the annuitants finding that they would not receive the benefit of their distress, except on the terms of paying the money remaining due to *H. A. Sturt*, and the younger children of the testator, by an order made the 13th of May, 1800, it was ordered, that the annuitants should, within a week, pay to *H. A. Sturt* 2464*l.* 1*s.* 10*d.* and enter into an agreement to pay the further sum of 5700*l.* then ascertained to be due to him; and to pay to the

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younger children of the testator the several sums of money reported due to them, out of the rents and profit of the sequestered estates, as the same should come to their hands: and it was further ordered, that the annuitants should give judgment in the replevin cause, and pay the costs of the distresses; but such of the goods as were not *heir looms*, were to be accounted for by the sequestrators. And it was ordered, that the annuitants should pay the costs of the *sequestration*, and that the *sequestrators* should deliver the possession of the premises sequestered to the annuitants, and pay over unto them the balance in their hands, after paying the costs of the sequestration, and all just allowances: and that the annuitants should stand as creditors of the said *Charles Sturt*, for what they should so pay, except the costs of the distress and replevy, and of the applications to the court subsequent to the distress; and it was referred to the master to settle the accounts, and to tax the costs. That the annuitants, in consequence of the said order, paid the said 2464*l.* 1*s.* 10*d.* to *Humphrey Ashley Sturt*; and also paid to the younger children of the said testator all the monies due to them, and were let in possession of the real estates; but before the *sequestrators* settled any account, or the costs were taxed, some executions at common law were issued against the goods of *Charles Sturt*, particularly one to a large amount, at the instance of Mr. *Edward May*, in Hilary term, 1802; and the sheriff of *Dorsetshire*, under the execution, seized the goods both at *Critchill* and *Brownsea*, and insists on keeping possession, although the said *Wm. Dean*, as one of the sequestrators, has claimed the said goods; that there then remained the sum of 4000*l.* and upwards, due to the annuitants, and therefore it was prayed, that an attachment might be issued against the sheriff of the county of *Dorset*, for his contempt, in having seized and kept possession of certain goods, (formerly belonging to the defendant *Charles Sturt*,) the said goods having been under sequestration, under the order of this court, and that the sequestrators might be directed to proceed to a sale of the

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said goods, not having been *heir looms* so under sequestration, and pay the produce thereof to *Wright* and *Evans* pursuant to the order of the 13th of November, 1800. Whereupon, and upon hearing counsel for the several parties, and for the said *Edward May* and the said *sheriff of Dorset*, and the several orders before-mention being read, his lordship did order, that the sequestrators should proceed to a sale of the goods in question, not being *heir looms* then under sequestration, and pay the produce thereof to the annuitants, as directed by the order of the 13th of November, 1800, in or towards satisfaction of the sum of 4464l. 1s. 10d. due to them. And in case there should be any surplus of the money arising by the said sale, after satisfying the demands of the annuitants, it was ordered that the same (the amount thereof to be ascertained by affidavit) should be paid into the bank to be placed to the credit of the cause subject to the further order.

There was no evidence given at the trial of any of the facts stated in the above order, or of the sequestrators having taken possession of any of the goods; on the contrary, it was admitted that the sequestration had not been laid on, and that in the month of January, 1803, before the return of the writ (which was delivered to the *defendant* on the 17th of December, 1801,) when Mr. *Starling*, agent for the *plaintiff*, went with a sheriff's officer, who had a warrant, to *Charles Sturt*'s house, at Brownsea, Mr. *Sturt* was in possession of the house and goods. Upon their communicating to him the business they came upon, he told them that his goods were under sequestration, but the officer, by direction of *Starling*, took the goods, and with his assistance made the inventory; after which *Starling* went away, leaving the officer in possession. The sheriff at the return of the writ returned *nulla bona*.

The question for the opinion of the court is, Whether the *plaintiff* is entitled to recover? If he is, the verdict to stand; if not, a nonsuit to be entered.

GASELEE, *for the plaintiff*. "Although the sheriff might have applied to the court of Chancery for relief

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when the *fi. fa.* was delivered to him, he is not entitled in a court of law to make this return. The writ of sequestration after a decree, of which it is said that the first instance of its issuing was in the time of *James* I. is merely a personal process, and abates by the death of the party; and it does not actually bind the goods *.

[LE BLANC, J. "That is only when it is *mesne* process; but when it is to enforce a decree, it is an execution."]

"On common law process of execution the sheriff may sell the goods, but under a process from the court of Chancery the commissioner cannot sell. For a sequestration is no title to a purchaser †. And, if it were to bind the goods where there is no time fixed for the return of the writ, the consequence would be, that process out of chancery would defeat all purchases and sales of property.

[Lord ELLENBOROUGH, C. J. "In case of a sequestration improperly obtained, or not used with due diligence, the party might apply to the court out of which it issued, for relief."]

"In this case at any rate the sequestration cannot affect the property, for it has not been executed; and the court will hardly give a greater effect to a sequestration, which is kept back for the purpose of protecting goods fraudulently, than it would to a like fraud by means of that which has been properly termed a *pocket fi. fa.* In case of judgments at law, in order to bind the property, they must be registered, and purchasers may have notice of them by searching the rolls; and the statute of frauds provides, that they shall only bind from the *delivery* to the sheriff, and not from the *teste*; and even that delivery must be *bona fide* for the purpose of executing it. So that if one *plaintiff* deliver a writ to the

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* 3 *Atkyns*, 594; 2 *P. Williams*, 621; 1 *Vesey*, 182, *contra*, when after a decree.

† 3 *Vesey*, jun. 23.

sheriff, and do not take out a warrant for the execution of it, he will not have priority over a second plaintiff, who delivers his writ to the sheriff after him, but takes out a warrant, and requires it to be executed *. Whether this sequestration ought to have priority, is a question of fact or of law. If a question of law, then the facts are sufficiently stated; but if merely of fact, whether the return was fraudulent and by collusion, the court will permit us again to go before the jury to decide upon the question of fraud; for these facts, as to the orders not being acted upon, were not laid before the jury, but the Judge thought at the trial that they ought to be laid before the court. But it is clear that there was fraud, and that the sequestration was merely used for the purpose of protecting the goods. If it is not fraudulent, yet there is such *laches* on the part of the sequestrators, that the sheriff was not bound to take notice of the sequestration, and ought to have levied under the *fi. fa.*, and this return therefore was false, and the *plaintiff* is entitled to recover."

Lord ELLENBOROUGH, C. J. "There was pregnant evidence to go to the jury on the question of fraud in some of the parties; but the question is now, Whether the sheriff was at liberty to consider the *sequestration* as a nullity."

GROSE, J. "Fraud is most apparent; for this is a stale writ of sequestration, two years old, on which nothing is done, and the sheriff ceases to levy without taking any security; but if you have gone *once* down to trial, and there has been an abortive conclusion of the case, by not leaving the question of fraud to the jury, we cannot now *piece* it out by referring that question to them after a case for the opinion of the court is settled."

LAWRENCE, J. "The sheriff made no application to

* 1 *Wilson*, 44, and *Smallcomb* v. *Buckingham* and *Cross*, 1 *Ld. Raym.* 252.

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the court in this case * to obtain time before he returned the writ, and to get relief either from this court or the court of Chancery."

DAMPIER, *contra.* "Had the question of fraud gone before a jury, it would have appeared that there was no fraud in the sheriff. He was, at the time of receiving this *fi. fa.*, beset with difficulties. On the one side the *plaintiff* was sueing him at law, and on the other the parties were applying to the court of Chancery. The orders in chancery subsequent to the *fi. fa.* were inserted in the case to shew that the sequestration was acted upon by the court of Chancery, and that it was considered there as a subsisting *lien* upon the goods after the *fi. fa.* issued. If the sequestration conveys no property, then *Sturt*'s possession is no badge of fraud, for it is still consistent with the *lien* of the sequestrators. There are many cases in which the sheriff cannot seize the goods on account of a title, which is at the time only inchoate. Thus, if a levy is made, and the goods are not removed, a commission of bankruptcy will supersede the execution ‡. Here the sheriff had notice of the sequestration; and it is said to be the fruit of a *long* suit, and that it ought to be favoured †. The sheriff thought he should be liable to an attachment for a contempt of the court of Chancery, for selling the goods on which there was a previous lien by the sequestration, which has relation to the issuing of it; and although the goods were apparently in the possession of *Sturt*, yet they were liable to be divested by a title completed subsequently, but having relation to a prior date, namely, that of the sequestration. In cases of executions at common law, the return is on a day certain; and the sheriff knows, that if it is not executed before

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* In another case, under the like circumstances, it was stated that he did, but not in this case.

† *Cooper* v. *Chitty*, 1 *Burr.* 20.

‡ 1 *P. Williams*, 307, 308.

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that time it cannot be enforced, and he may disregard it; but here the return of the sequestration is left to the discretion of the Chancellor, who may call for it at any time on the application of the parties, and the sheriff is left in the most embarrassing uncertainty; and therefore this court will not compel him to make a levy upon the writ.

[LAWRENCE, J. "If he had come to the court and stated his difficulty, the court would have assisted him; but if he will take upon himself to act, he must do it at his peril."]

"A sequestration gives a lien upon the goods, and is not merely personal; and there is nothing in the argument that it conveys no title, for even a *fi. fa.* conveys no title. As if a *fi. fa.* issue against the goods of *A.*, and the sheriff seize the goods of *B.* and sell them, trover will lie.

[Lord ELLENBOROUGH. "The sequestration virtually conveys a title if the Chancellor will grant an injunction against all persons who sue in trover for the goods. Is there any case which questions the authority of *Vernon*, 58., where it is said, that it binds the property, not only from the time when it is laid on, but from the time when it issues?—To this it was answered that there was none."]

"As to the sequestration being no record, the same objection lies to an inchoate commission of bankruptcy, which yet when afterwards completed is allowed to supersede an execution. The case in *Wilson* was decided upon the jury having found the fact of fraud."

GASELEE, *in reply*, said, that he was not much pressed by the effect of the order of the 17th of January, 1803, which had been urged on the other side to shew that the sequestration was acted upon, for it was not only subsequent to the *fi. fa.*, but it could not be supposed that the Chancellor would have committed the sheriff for a contempt in not regarding a sequestration upon goods which were left in the actual possession of *Sturt*. That as to the *notice* to the sheriff, it was a mere nullity, for it did not proceed from the sequestrators, or any party to an ad-

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verse suit, but from Mr. *Sturt* himself; and it had, in fact, no effect upon the sheriff, for the case states, that he still proceeded actually to seize the goods. That the statute of frauds must be taken to apply to this writ of sequestration, as in the nature of an execution on a decree in Chancery, as well as all others, and then it could only bind from the delivery *to be executed* *. That the case of a commission of bankrupt, binding the goods by relation, though at first it be only an inchoate title, is very different from a sequestration, for it derives its effect from a positive statute, which vests all the bankrupt's property in the commissioners and their assignees immediately from the bankruptcy.

Lord ELLENBOROUGH, C. J. observed, that enquiry should have been made, whether the court of Chancery would have considered the seizing of the goods under the *fi. fa.* as a contempt, for in that case it would be clearly a justification of the sheriff. And, in order to enquire into this point, THE COURT deferred giving judgment from *Michaelmas term*, when the case was argued, until *Hilary term*, when the opinion of the court was delivered to the following effect by

Lord ELLENBOROUGH, C. J. after stating the case, "There was no evidence given at the trial that any thing was done upon this sequestration. Even up to the month of January, 1803, which was long after the *fi. fa.* was returnable, Mr. *Sturt* was in possession of the house and goods at *Brownsea*. Nothing, therefore, as to what has been since done under the sequestration, can be adverted to in the case for any purposes immediately connected with the question; since it does not appear on the facts laid before the jury. And the question is, Whether the existence of a writ of sequestration, which had been issued previous to the *fi. fa.*, but on which writ of sequestration nothing

* Lord ELLENBOROUGH observed, that if that analogy were pursued, there was an actual delivery to the commissioners to be executed.

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had been done, be an excuse to the sheriff for not executing the writ of *fi. fa.* upon the goods in the actual possession of *Start*, against whom the writ was issued. The competence of this, as an excuse, depends upon the nature of a sequestration; and this is a point involved in some degree of doubt. [His lordship here referred cursorily to the cases which had been cited on the nature of a commission of sequestration.] We shall for the present, however, assume, that the operation of that commission, is according to 1 *Vernon*, 58, *Burdett* v. *Rockey*, binding from the time of the awarding the commission, and not from its being laid on by the commissioners, although that is the only case in which it is so considered, and then it stands as in case of an execution at common law: and, in so considering it, we allow it the furthest efficacy that can be given to it. But though it binds the property, as between the parties, immediately, it does not actually divest the property in the goods out of the original possessor, so as to prevent a subsequent writ in all cases from having any effect upon them. This, in the case of an execution at common law, is settled in the case of *Smallcomb* v. *Cross* and *Buckingham**. Lord *Holt*, according to the report of that case, in *Comyns*, 36, says, "that if there were two writs of *fi. fa.*, the one bearing "*teste* on such a day, and the other on the next day, and "the last writ was first executed, such execution should "not be avoided; and the party had no remedy but against "the sheriff, for the sheriff ought to make execution at his "peril; and the sheriff shall be excused, if there was no "default in him, as if he who took out the first writ con"ceals it in his hand; the sheriff may rightly make execu"tion on another writ, which bears the last *teste*, but came "first to his hands. And it hath been held, that if a re"cognizance be extended the executor ought to satisfy "that before a judgment which is not prosecuted. There"fore in the present case Lord *Holt* says, as he who first

* 1 *Lord Raym.* 252.

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"brought the *fi. fa.* did not desire that it should be exe-
"cuted, the sheriff might rightly execute the last *fi. fa.*

"All the reports of this case agree, that the writ first de-
livered ought to be first executed; but that although the sheriff does otherwise, yet the parties can only have their remedy against him. And the reason given in Lord *Raymond*'s report of it is, that sales made by the sheriff ought not to be defeated; but he says, in that case, that no action lay against the sheriff, because he who delivered his first writ would not take out a warrant from the sheriff to levy the goods, so that it seems he had a design only to keep the execution in his pocket to protect the *defendant*'s goods by fraud. There are several other cases to the same effect in *Viner's Abridgment*, vol. x, title "*Execution*," (A—a.), and in *Comberbach*, 452. In 2 *Equity Cases abridged*, 381, Lord *Hardwicke* says, "that "before the statute the debtor's goods were bound in the "sheriff's hands from the teste of the writ of execution; "to avoid this the statute was made, that the goods shall "only be bound from the delivery of the writ to the she-"riff; but neither before nor since the statute is the *pro-*"*perty* in the goods altered until the execution executed. "The meaning of these words, 'that the goods shall "be bound from the delivery of the writ to the sheriff,' is, "that after the writ is so delivered, if the *defendant* "makes any assignment of his goods, unless in market "overt, the sheriff shall take them in execution." This, indeed, would be contrary to what is said in *Comberbach*, 452, but that is a short report in which the actual point and name of the case are both mistaken. Lord *Kenyon*, indeed, in *Rorke* v. *Dayrell**, says, "by the common law abridged, as it is by the statute of "frauds, the property of the debtor's goods, is bound by "the delivery of the writ to the sheriff, there then remains "no property in the debtor on which the prerogative of "the crown can attach;" but he cites in support of his opi-

* 4 Term Rep. 412.

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them no authority but *Comberbach, Lechmere* v. *Thorowgood*, 123, which is the more unworthy of consideration, since Lord *Mansfield*, in *Cowper* v. *Chitty*, says, that he must have mistaken what was said by Lord *Holt*; and, indeed, what fell from Lord *Kenyon* does not apply to the question immediately before us, for the writ of *fi. fa.* was in that case actually executed. And the point, as to how far the goods were bound by the *delivery* of the writ, does not appear to have been material there. Assuming, therefore, that the opinions of Lord *Holt* and Lord *Hardwicke*, before stated, and the case of *Smallcomb* v. *Buckingham*, lay down the rule correctly, the question may be reduced to these points: Whether the commissioners appointed in the sequestration could have any remedy over against the sheriff for selling the goods after the sequestration issued? and whether the court of Chancery would proceed against the sheriff for a contempt, or otherwise, in doing so? Now, as to the first of these questions, what complaint could the sequestrator have against the sheriff, seeing that he gave him no notice of the sequestration, and that he might have enforced it by due diligence himself. For the mere statement by *Sturt*, that the goods were under sequestration, cannot be taken to enure as a good notice against an adverse creditor. As to the light in which a court of Chancery would view this, it would probably be a contempt of the court by the commissioner who neglected to enforce it in due and reasonable time. And probably the sheriff, upon a statement of the facts, might there also obtain some relief. A full indemnity he might have had by applying to this court when the *fi. fa.* was delivered to him, and before the return of it. In order to found a contempt of the court of Chancery, however, it does not appear that notice of the proceedings is necessary, for it was decided in Mr. *Herbert's* * case, that the marrying a ward of the court of Chancery is a contempt of the court, although

* 3 Peere Williams, 116.

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the party had no notice of his being so at the time; but that is not in a case circumstanced like the present, in which a sheriff is called upon to act under the authority of a writ, and is called upon to execute it without having had notice of the previous writ to the commissioners. And although the sequestration is not returnable on a day certain as a writ at common law, yet it requires the commissioners, 'at proper and convenient days and hours, 'to go and enter upon the messuages, &c. and to *collect* 'and get into their hands, not only the rents and profits 'of the real estate, but also all his goods and chattels, 'and *detain* and *keep* the same under sequestration in *their* 'hands till he shall have cleared his contempt.' So that the sequestrators do not appear to have acted with due diligence according to the terms of the writ. The case of *Hutchinson* v. *Johnstone**, may be supposed to be contrary to the principle upon which we are now proceeding, for in that case it was decided, that where the sheriff receives two writs of *fi. fa.* on different days, and no sale is actually made of the *defendant*'s goods, the first execution must have the priority, even though the seizure was first made under the second execution. But in the present case here are two different authorities to take the goods delivered to two different persons; and that is very distinguishable from the question, which of two writs delivered to the same person shall have priority. Indeed the question is ultimately brought to this, Whether the *defendant* is to be regarded as having made a true return of *nulla bona*, when there were goods liable to be seized under the writ, unless the sequestration had so changed the property in them as to make them no longer the goods of *Sturt*. That the property is not so changed by a writ which is not executed at the time appears from the case above cited of *Smallcomb* v. *Buckingham* and *Cross*; and as the doctrine in that case, and the others which have been referred to, appears not to be contrary to any

* 1 Term Reports, 729.

cases at law, and we are mainly of opinion, that the sheriff would not have been subject to any inconvenience by executing the writ of *fi. fa.*; we think that the return of *nulla bona* was not a true return, and that the *plaintiff* is entitled to recover.

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POSTEA TO THE PLAINTIFF.

GOODTITLE *dem.* PADDY and Others *versus* B. B. MADDEN and Others.

A RESIDUARY devise of all the testator's lands, goods, and chattels, stock in trade, "so that the devisee shall sell his stock in trade, and household goods; and if these will not pay, she shall sell next the house in fee, *in* Penzance, *and not* Prospidnack; *so that she shall pay all lawful debts:" Held, to give an estate in fee.*

The direction to sell is merely discretionary.

THIS was an action of *ejectment*, brought to recover the possession of a messuage with some lands at *Penzance*, in the county of *Cornwall*, which was tried before Mr. Baron GRAHAM, at the last summer assizes for the county of Cornwall. The lessors of the *plaintiff* claimed, as heirs at law of one *Joseph Pascoe*; and the *defendants* derived their title from *Joan*, his wife, under a devise to her contained in the will of the said *Joseph Pascoe*, dated the 9th of January, 1767, which is in words as follows:

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"All the rest that I have in the world, both houses, lands, goods, and chattels, stock in trade, and all other things that belong, or may belong to me, I give to my present wife *Joan Pascoe*, my executrix: so that she shall sell my stock in trade, and household goods; and if these will not pay the debts, she shall sell next the house of *fee*, in *Penzance*, and not *Prospidnack*: so that my executrix shall pay in good time all lawful debts that shall appear."

The learned Judge, at the trial, thought that there was

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no doubt that, by this devise of the residue, the *legal* estate in *fee* in the lands in question, passed to the wife of the testator, independently of the question which might be raised *in equity* as to whether she is to be considered as a *purchaser* by the payment of the debts of the testator out of her own funds; and there was a verdict for the *defendants*.

In *Michaelmas term* last, JEKYLL, *for the plaintiffs*, moved for a new trial, on the ground that *Joan Pascoe* took only an estate for life. In support of this position, he cited the cases of *Denn* dem. *Moore* v. *Mellor**, *Sperring* v. *Buckner* †, *Doe* dem. *Small* v. *Allen* ‡.

The case coming on to be argued in this term, GIBBS and BURROWS for the defendants, argued, that the devise of the lands to the wife, being for the purpose of selling them, as well as the household goods and chattels, and stock in trade, she must of necessity have an estate in fee therein, or she could not sell them. That with this view of the case, it was not even necessary to argue whether she took a beneficial interest to herself or not. *Lovelacres* ex dem. *Mudge* v. *Blight**. Lord *Mansfield* there says, "where any thing is directed to be done, for which, strictly speaking, an estate for life would be insufficient to answer, the court will imply a fee.—That in the beginning of the will there was a clause shewing that he intended to dispose of all his property by the will. Thus, 'In order to settle my affairs, or the little that God has blessed me with, so as to prevent any difference that may arise amongst my family and friends;" and they referred to *Doe* ex dem. *Palmer* and Others v. *Richards* †; and *Goodright* v. *Stocker* ‡.

JEKYLL and DAMPIER, *contrà*, cited the cases before referred to, and contended, that the debts were to be first paid out of the personalty; and that the whole of the de-

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* 5 Term Rep. 550.
† 6 Term Rep. 610.
‡ 8 Term Rep. 500.
|| *Cowper*, 352.
§ 3 Term Rep. 356.
¶ 5 Term Rep. 13.

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vise was only upon a contingency, and in case the personalty should not be sufficient to pay the debts.

Lord ELLENBOROUGH, C. J. "In the case of *Denn* v. *Mellor*, the estate was given *after* payment of the debts, and then they were not charged upon it; and there could be no burthen on account of them thrown upon the devisee. This is, as a gross sum, charged upon the lands: and it seems to me clear, that this is an estate in fee to the wife of the executrix. The words are plain [here his lordship read the will], and the devise concludes, "so that she shall pay all my lawful debts that shall appear." Here is a charge upon the executrix to pay the debts; and the charge, and the estate should be concurrent. But it is said, that it is contingent only; and in case the personalty should turn out not to be sufficient; but it appears to me that this is only directory to the wife, and leaves her a discretion. In the other cases where the devise has been held to give an estate for life only, the testator has ordered the debts to be paid, before he devises the estate, and in those cases the estate does not commence till after the debts are paid. On the authority of *Doe* dem. *Willey* et al. v. *Homes**, I think this gives the fee. The principle was gone into very fully in the case of *Doe* v. *Mellor*, and the distinction is there very properly laid down by Lord *Kenyon*."

GROSE, J. observed, that the charge was upon the wife personally, and that for the purpose of paying the debts so charged she must have the fee.

LAWRENCE, J. "The question in this case is, What is the nature of the charge for the payment of the debts? Whether the charge is upon the person of the devisee, or upon the estate? In the former case she will have the fee, because otherwise it might happen that an estate for life could not be sufficient to satisfy the debts, and then she would be injured by the devise. This is a charge upon the person, for it is devised "so (or in order) that she shall pay all my lawful debts that may appear."

* 8 Term Rep. 1.

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The direction to sell is merely a recommendation to her.

LE BLANC, J. of the same opinion. "If the debts had not been satisfied upon the sale of the house, *Prospidnack* must also have been sold. The words, "so that she shall pay all lawful debts," may be transposed before the direction to sell the stock in trade, &c. and then it will appear more clearly a charge upon the person, and that the direction to sell is merely discretionary.

POSTEA TO THE PLAINTIFF.

JONES *versus* ASHBURNHAM.—*Tuesday, January* 21.

ASSUMPSIT, for that S. F. B. *deceased, being indebted to the* plaintiff *at the time of his death,* N. *the wife of the* defendant, *before her intermarriage, in consideration thereof, and in consideration that the* plaintiff, *at her request, would* forbear *and* give day of *payment of the said debt, undertook, &c.: Held, ill on special demurrer, for not stating either that* N. *or any other person was liable to be sued.*

A general forbearance, like the forbearance of an individual, is not a good consideration, unless there is somebody to be forborne.

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IN ASSUMPSIT the *plaintiff* declared, For that whereas one *Samuel Forester Bancroft,* since deceased, in his life-time, to wit, on the 15th of December, 1799, and at the time of his death, was indebted to *Evan Jones,* in a certain sum of money, to wit 58l. 7s. 2d. of lawful money, and for divers goods, wares, and merchandizes, by the said *Evan,* before that time sold and delivered to the said *Samuel Forester Bancroft,* and at his request, to wit, at Shrewsbury, &c. whereof the said *Nancy* there had notice; and whereupon, and the said sum of money being and remaining wholly unpaid, afterwards and after the death of the said *Samuel Forester Bancroft,* and whilst she the said *Nancy* was sole, and before her intermarriage with the said *Denny,* to wit, on the 27th of

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March, 1801, at *Shrewsbury* aforesaid, in the county aforesaid, in consideration of the premises, and also in consideration that the said *Evan*, at the special instance and request of the said *Nancy*, would forbear and give day of payment of the said sum of 58l. 7s. 2d. as hereinafter in this count mentioned, she the said *Nancy*, by a certain note, or memorandum, in writing, then and there made and signed by her, according to the form of the statute in such case made and provided, undertook, and then and there faithfully promised the said *Evan*, to discharge the said debt so due and owing to him the said *Evan* as aforesaid, in a reasonable time then next following; and to send him 20l. in part of payment thereof in *July* then next following; and although the same *July* is long since past, during which the said *Nancy* continued sole and unmarried; and a reasonable time for the discharge of the whole of the said debt or sum of 58l. 7s. 2d. according to the tenor and effect of the said promise and undertaking of the said *Nancy*, is also long since elapsed, and although the said *Evan* hath always from the time of making the said promise and undertaking, hitherto forborne and given day of payment of the said debt of 58l. 7s. 2d. to wit, at Shrewsbury aforesaid, in the county aforesaid, whereof the said *Nancy*, while she was so sole and unmarried, and the said *Denny* and *Nancy* since their intermarriage respectively, there had due notice, yet the said *Nancy* did not, nor would pay the said 58l. 7s. 2d. &c. and so assigned a breach in non-payment according to the promise. There were other counts upon forbearance to her, stating a debt due from *S. F. Bancroft*, but not alleging in what manner the said *Nancy* was liable to pay.

To this declaration the defendant demurred specially, stating the following causes; for that "it is not alleged or shewn in the said declaration, from whom the said several sums of 58l. 7s. 2d., in the said declaration mentioned, were due and owing to the said *Evan*, at the said respective times when the said *Nancy* is supposed to have made the said several promises and undertakings in the said declaration mentioned, or that any person or persons were, or was then liable to pay him the said *Evan* those sums, or

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any of them, and for that it is not alleged or shewn in the said declaration, to whom the said *Evan* hath forborne and given days of payment of the said several sums of 58l. 7s. 2d. in the said declaration mentioned; and also for that the said declaration doth not disclose or set forth any good, legal, and sufficient consideration for the said supposed promises and undertakings of the said *Nancy*, in the said declaration mentioned; and for that it does not appear in or by the said declaration, that the said *Evan* hath any good or sufficient cause of action whatever against the said *Denny* and *Nancy*.

MARRYATT, *in support of the demurrer*. "There are many authorities to shew that a promise in consideration of forbearance, is good in assumpsit; but it is not shewn in this declaration, that the person to whom the forbearance was given was actually liable to any suit; and the main question here is, Whether, without shewing that any person is liable to pay the debt forborne, this action will lie? Most of the authorities on this subject are collected in *Comyns' Digest* *. A promise in consideration of forbearance, when the party is not chargeable, as by an heir or executor who has no assets, is not good †, and there is no distinction between the cases there cited and the present; for here also there is no liability shewn on the part of *Nancy Ashburnham*. So in *Smith* v. *Johns* ‡. Assumpsit for a legacy bequeathed to the *plaintiff* by *A*. His wife and executrix had goods, and married the *defendant*, who in consideration that the plaintiff would forbear to sue, promised to pay it. He pleaded that his wife died before the promise was made; and on demurrer it was held a good plea, for the wife being dead he was not chargeable with the legacy; and though it was alleged that he had goods in his hands, yet it was not shewn in the declaration how he had them; and if he had them not as executor or administrator, he was not liable. In *Hill* v. *Baylie*, *Roll's Abridgment*, *Viner*, V. 1. 307, the

* Action upon the case upon assumpsit. B. 1, 2, f. (8)

† 2 Mod. 702, 3; 1 Rol. 28, c. 35.

‡ Yelv. 184.

husband of the *defendant* was indebted to the *plaintiff*, and died possessed of goods which came to her hands *legitimo modo*, and the *defendant*, in consideration that the plaintiff would forbear *the debt* for a certain time, promised to pay it. It is there said, that a *forbearance to sue all the world is a good consideration*, for it is a *prejudice to the plaintiff*, and a *benefit to a stranger*. But that is clearly an assumpsit in consideration of assets: and though he cites *Hume* v. *Hinton* *, where it was not alleged that any goods came to the hands of the *defendant* which were the goods of the debtor; yet that was after verdict, when the party might have proved *assets* though they were not stated. But another reporter who cites the same case † states, that it was held to have been no consideration, because the *defendant* was not liable to any suit, so that the *plaintiff* had no prejudice by such forbearance. In *Quick* v. *Copleston* ‡, it appears, as if forbearance generally in an action against the widow of an intestate, without shewing her executrix, were a good consideration; but in one report it appears only that the case was adjourned; and the discourse was with the intestate's widow, as she was on her journey to *London*, and *for fear of being arrested she made the promise: and a case was there cited, in which a promise made through fear of a dead body being arrested, although the party was not liable, was held to be good.*

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[Lord ELLENBOROUGH, C. J. "That must clearly be a bad consideration. It is a promise obtained by a threat to do that which is *contra bonos mores*; obtained by working upon the feelings of the relations."]

"Laying aside these authorities, which stand upon grounds not tenable, there can be no doubt that upon general principles it is necessary to shew a liability in some person or other. For it is clear if a forbearance to sue *A.* is stated, it must be shewn that he is liable to be

* *Styles*, 304.

† *Hardres*, 73. He cites it by the name of *Hummers* v. *Hunton*, but in *Raymond*, 32, it appears to be adjudged for the plaintiff.

‡ Sid. 242. *Lev.* 161. *Keb.* 866.

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sued ;* and by a parity of reasoning, if the consideration of this promise is a forbearance to sue any person whatsoever in the world, some one must be shewn to be liable, whom it might be the *defendant*'s interest to relieve from a suit. This declaration is therefore bad upon special demurrer; for it does not shew either who was liable to be sued, or that any person whatsoever had assets to make him liable, or that the *plaintiff* himself was in a situation to have granted forbearance to any person whatsoever."

JERVIS, *contrà*. "The question has been truly stated on the other side; but here it is not necessary to shew any liability to be sued on the part of the *defendant*'s wife, or any one else, because the promise is in consideration of forbearance *generally*, and in that case it is immaterial whether the party making the promise, or any one else, is proved *expressly* to be liable or not. The rule, as to what is sufficient to be a good *consideration* for a promise, is laid down by *Yates*, J., in *Pillans* v. *Van Mierop*† 'Any damage to another, or suspension, *or forbearance of his right, is a foundation for an undertaking, and will make it binding, though no actual benefit accrue to the party undertaking.*' Here the *plaintiff* had a right in him to sue some one for the recovery of his debt actually due from *Bancroft*; and though it might not appear who was liable at the time, yet, subsequently, some person might have become liable in consideration of having assets. The giving up the right of action against such person is the relinquishing of a *right* within the rule laid down by Mr. Justice *Yates*. In the cases of *Loyd* v. *Lee*,‡ and *Tooley* v. *Windham*,‖ there was no right in the *plaintiff* to sue any one. Here there is a right to sue some one, and at least a possibility of a loss, which is sufficient to found an assumpsit upon, though there be no actual benefit to the other party. The cases cited on the other side, *Quick* v. *Coppleston*, and *Hume* v. *Hinton*, are decisive; that when the for-

* *Crooke Eliz.* 206, *Tooley* v. *Windham*. He cited also *Loyd* v. *Lee*, 1 *Strange*, 94; *Rann* v. *Hughes*; 7 Term Rep. 750, *n*.

† 3 *Burr.* 1672. ‡ 1 *Strange*, 94.

‖ *Cro. Eliz.* 206. These cases were cited on the other side.

bearance is general, not to sue any person in the world, it is not necessary to shew that any one is liable at the time of the promise made."

Lord ELLENBOROUGH, C.J. "It seems to me, that to decide in favour of this demurrer will not be to break in upon any rule of law, neither will it go to affect the rule which was laid down by Mr. Justice *Yates*, in *Pillans* v. *Van Mierop*. The general rule in law is, that in order to make a promise not a *nudum pactum*, there must be a consideration of benefit to one party, or of loss to another. When it is said that we are breaking in upon this rule, let us examine it, and see whether there is any thing in it which applies to this case. Except for the cases cited in argument, namely *Hume* v. *Hinton*, and *Quick* v. *Coppleston*; and there is hardly any case in the law to which some cases might not be found in opposition; there is no exception to the general rule, that in assumpsit on a forbearance there must be some one liable. Those cases, therefore, are not authorities to bind us; and applying the rule laid down by Mr. Justice *Yates*, the first ground for a consideration is, 'any *damage* to another.' How is this a damage to another? It does not appear from this declaration that *Bancroft* had left any person *in rerum natura*, who would be liable to be sued. There is no debtor who could be the object of a writ. Next, as a foundation for an assumpsit there must be 'suspension or forbearance of a right.' *Right* is a correlative term, and must mean a right capable of being enforced against some one. Here it is true there is a *corpus debiti;* but there is no fund out of which it is to be paid, no person against whom payment can be enforced. And there is no *suspension* of any right, unless there is an *existing* right capable of being prosecuted with effect at the time of the promise, which there is not here. It does not therefore appear that any thing laid down by Mr. Justice *Yates* in that case squares with the present. Let us look then to the cases. First to 1 Styles, 248, *Rosyer* v. *Langdall*, rather than to the case which is cited from a subsequent part of the same book.

"*Rosyer*, an executor, brought an action of assumpsit

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"against *Langdall*, a *feme* administratrix, and declared, "that the *defendant*, in consideration that he would forbear suit until she had taken out letters of administration, promised to pay money due to him by the intestate. After verdict and judgment for the *plaintiff* error was brought to reverse the judgment; and exception was taken that the plaintiff had set forth no consideration for the assumpsit in his declaration, for all that was alleged was, that the *plaintiff* should forbear suit till the *defendant* had taken out letters of administration, which is no consideration at all, for the *defendant* was not liable to be sued as administratrix until she had taken out letters of administration. There was also a second objection: *Roll*, C. J. held the first a good exception, for the *defendant* was not chargeable before letters of administration taken forth, if she does not intermeddle with the goods of the intestate, and it doth not appear here that she did; neither is the *defendant* compellable to take forth letters of administration, for they may be granted to the next of kin, according as the statute ordains. *Jerman*, *Nicholas*, and *Ask*, Justices, to the same intent. Thereupon the rule was—*reversetur nisi*; but upon some objections on the other side to the writ of *error* and return, it was adjourned." This is to be met by the case of *Hume* v. *Hinton*, in the same book, 304. There the *plaintiff* declared, that whereas "the son of the *defendant* did in his life-time owe to the *plaintiff* 8l., and died intestate; the *plaintiff* demanded the 8l. of the *defendant*, the mother of the intestate, whereupon she promised, that if the *plaintiff* would stay till *Michaelmas* next, then she would pay it. On non-assumpsit pleaded, and a verdict for the *plaintiff*, the *defendant* moved in arrest of judgment that there was no consideration, and cited *Morgan*'s case, 6 *Car.* to shew that an assumpsit to pay a *remediless* debt, if the *plaintiff* will stay for it, is not good; and that there appeared no person liable to pay the debt either plainly or by intendment; and it did not appear what person the son was, or that he either had or left any goods, and that the ground of the action was the *piety* of the mother, and that the ordinary is not chargeable unless goods come to his hands.

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"There was another objection as to the averment of the "performance of the consideration, as stated in the "breach, which was said to be not sufficiently certain. "*The court*, upon the first point, held, that the considera- "tion was good; for it is that the *plaintiff* shall forbear to "sue, generally, which goes to all the world, and it is not "only to forbear such a particular person, but to forbear "to sue for the money, and this forbearance may be a pre- "judice to the party, and a loss in not suing till that time. "—*Roll*, C. J. observed, 'that if the breach were not well "assigned, the *verdict* would not help it. And after hear- "ing the counsel on another day as to that point, judg- "ment was given for the *plaintiff*, because both the con- "sideration and the averment were held good.' It is said there is no difference between that case and the present, but I conceive that there is a material difference in its being after verdict; so that many things might be presumed there which cannot, in this case, upon a special demurrer. Now as to the case of *Quick* v. *Copplestone*; in that case the promise was made through fear of being arrested, and it is so stated in the declaration; and *Hyde*, C. J. held, "that "a forbearance to sue one who fears to be sued is a good "consideration; and he cited a case in the Common Pleas, "when he sate there, where a woman who feared that the "dead body of her son would be arrested for debt, pro- "mised, in consideration of forbearance, to pay; and it "was adjudged against her, though she was neither *exe- "cutor* nor *administrator*. But the other Judges doubted "of this." And I think it would be bad even after verdict, for it appears *vitious* upon the face of it. Such a means of extorting a promise is not to be endured. It is impossible to look upon that as a good promise which is made in consideration, that a person will forbear to do a violent and unlawful act; that he will forbear to do a violent injury to the feelings of all the relations of the deceased. In the present case, the consideration stated confers no benefit on the one party, and causes no apparent detriment to the other; the consideration is therefore defective, and the declaration is bad."

GROSE, J. "It must be admitted, and indeed is ad-

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mitted, that if no consideration appears upon the face of this declaration, the *defendant* must have judgment. The difference is very material between a special demurrer and a motion in arrest of judgment; for, in the latter, every thing is to be presumed in favour of the *plaintiff*. I admit, that if there is any loss to the *plaintiff*, that alone is a sufficient consideration for an *assumpsit*; and that forbearance to sue may be a good consideration; but it is a perversion of terms to say, that there is any forbearance to sue unless there is somebody to be sued. Here there is nobody to be sued. Upon that short ground I think that the consideration here stated is insufficient. I will not go over the cases which his lordship has examined, but I agree with him as to the answers that have been given to them."

LAWRENCE, J. "This case comes before us on a special demurrer; and there is a material difference between such a case, which points out particularly the informality of the declaration, in not specifying some one liable to be sued, and those which arise only upon motion in arrest of judgment. The argument in support of this demurrer is, that there must be somebody liable to be sued by the *plaintiff* in order to lay a ground for the forbearance, which is stated as the consideration of the promise. Now there would be no such person to be sued, if the debtor died without leaving effects to answer for the debt; and, in this case, it does not appear that he left any. Suppose he had been *illegitimate*, and there was no person to administer to him, the crown would have been entitled to his effects. I cannot but say that I agree with what has been urged by the *defendant*'s counsel, that if an agreement not to sue *A*. is not a foundation for a promise unless *A*. is liable, so a promise in consideration of forbearance generally, as to all persons in the world, is not good unless there be some person in the world who is liable to be sued. In the former case, if he promise not to sue *A*., and *A*. is not liable to be sued, it is no consideration because he *surceases* nothing; so here, he *surceases* nothing if there be no one whom he can sue. The rule stated by Mr.

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Justice *Yates* has been pressed a great deal; but that is by no means against the present decision; for all that was decided by that case, as it respects this, was, that it is not necessary that the *plaintiff* should have been entitled to sue the *defendant* originally; but that it would be sufficient, if he might have sued another person, and, in order to obtain the promise of the *defendant*, gave up his claim against that person."

LE BLANC, J. of the same opinion. "In all the cases which decide that a general forbearance of suit is a good consideration, it must be understood with the limitation, that it is not a good consideration, unless it appears, or can be intended, that some person is liable to be sued. Here it is pointed out by the demurrer, that no person appears to have been liable to be sued, for the debt which is said to have been forborne. Here, therefore, is no suspension of a right by the *plaintiff*; and, upon the general current of authorities, notwithstanding the cases that have been cited to the contrary, it appears that this is not a good consideration for an *assumpsit*."

JUDGMENT FOR THE DEFENDANT.

BURTON *versus* BURCHALL.—*Thursday, Feb.* 9.

In assumpsit against a surviving partner, the administrator, brother and next of kin of the deceased partner, is a good witness, for the plaintiff, to prove the contract.

BURTON versus BURCHALL.

THIS was an action for goods sold and delivered to the *defendant* and one *Harrison*, deceased, whom the *defendant* had survived. The *defendant* was a physician, and only a sleeping partner, and the contract was made ostensively with the deceased alone. Upon the trial at the last assizes for *York*, the *plaintiff*'s counsel called the brother, who was also next of kin, and administrator of the deceased, to prove the contract; when PARKE, *for the defendant*, objected, that he was an interested witness; for that, as

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he was administrator, he would by his testimony discharge the estate of the deceased from a part of the debt, and increase his own share of his effects, under the statute of distributions. The learned Judge overruled the objection; and there was a verdict for the *plaintiff*.

PARKE, in *Michaelmas* term, moved for a new trial; a rule to shew cause was granted, and it was shortly argued this term.

BUT BY THE COURT. "All the liability to be thrown upon the estate of the deceased, even as a partner, seems to have been introduced by the evidence of this witness. By this he makes himself liable, as administrator, for one half of the debt, which he would not have been, but for his evidence on this trial; he seems, therefore, to have had a directly contrary interest; such as to have rather made him refrain from giving evidence at all."

RULE FOR A NEW TRIAL DISCHARGED.

REGULA GENERALIS.

Peremptory Paper.—New Trials.

REGULA GENERALIS.

THE COURT were put to great difficulty by the pressure of business, at the end of this term, on account of the number of rules for new trials, which had stood over from the last term, so that, for the two or three last days in this term, they would hear only *one* counsel on each side; many cases stood over for *Easter term*, by consent of the parties, that they might be more fully heard; and in order to avoid the like difficulty in future,

IT WAS ORDERED, that the rules for new trials which stand over from one term to another, shall be entered on the peremptory paper, in the same order, and shall come on upon the second day of the term, and so each subsequent day in regular succession.

Enlarged Rules.

Jan. 26—*Jan.* 28.

Enlarged rules are not served, because both parties are before the Court.

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Enlarged Rules.

THE Court upon a case coming on upon an *enlarged rule*, in which the parties were not ready, said, that the party at whose instance the rule was enlarged should serve the rule, and that they would make a rule to that effect.

But on a subsequent day, when the case came on again, they observed, that it had not hitherto been the practice to serve enlarged rules, because both parties are before the Court; and that the practice on the Crown side was similar. No new regulation was made.

Petrie *versus* Daniel.—*Friday, Feb.* 10.

A TENANT of a farm entitled to the way-going crop of the harvest 1801, after his term expired, and paying rent up to the Lady-day preceding; previous to that day, viz. in June, 1800, agrees to let in the new tenant, and sells the standing crops, and takes a receipt for the value thereof, and also for 20l. "for the right of cropping the lands from June 18th:" Held, that, by this sale of the right of cropping, the tenancy is not to be considered as changed, and the out-going tenant must pay the rent for the time from Lady-day, 1800, to Lady-day, 1801. The out-going tenant had paid tythes and poor's rate for that time.

Petrie versus Daniel.

THIS was an action for money paid to the *defendant's* use, which was tried on the Norfolk circuit, and a verdict found for the *defendant*, upon the following facts: The *defendant* was tenant of a farm of arable land, held under Sir *Philip Molyneux*, and his tenancy expired at Lady-day, 1801. *Petrie*, the *plaintiff*, had taken a part of the farm, which was arable land, and was let into possession of it at Lady-day, 1800. It was the custom that the in-coming tenant should pay rent from the Lady-day preceding his entering on the land, and when he went out should take what was called the way-going crop, or te-

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nant's round, at the subsequent harvest. So that he paid rent for a time when he gathered no crop, and gathered a crop at a subsequent time when he paid no rent. *Petrie* wishing to be let into possession before *Daniel*'s term expired, which would then be in 1801, came to an agreement in June, 1800, to be let into the farm, and at the same time bought the standing crop, and also the right of the way-going crop. The standing crop was appraised at 242l. 4s. 9d. and a receipt was given as follows:—"Received 16th June, of Mr. *P.* in full of all demands 242l. 4s. 9d. being the value of the crops of oats, beans &c. and also 20l. as a premium for the right of cropping the lands from the 18th of June till 1801."—*Petrie* entered on the lands, *Daniel* paid the tythes and the poor's rate for the year 1801; but the rent being unpaid for that year, Sir *Philip Molyneux* distrained for the same, and this action was brought to recover 31l. being the rent paid to him for the arable land from *Lady-day* 1800 to 1801. The surveyor who appraised the crop gave in evidence at the trial, that the rent was deducted from the valuation of the crops, but that had he understood that *Daniel* was to pay rent from 1800 to 1801 he should not not have deducted it. The Jury upon this evidence found a verdict for the *defendant*, under the direction of the Judge.

SELLON, Serjt. *for the plaintiff*, moved for a new trial, which was argued this term by SELLON, Serjt. *for the plaintiff*, and WILSON, *for the defendant*.

Lord ELLENBOROUGH, C. J. "There is a considerable degree of perplexity in this case; but confining myself, as I always wish to do when there is a written document, to the receipt that passed between the parties, it appears that they had in contemplation a sale of two distinct things, namely, the right to the immediate occupation with the standing crops; and also the right of taking the way-going crop, and sowing the land for the raising of that crop. The receipt is for a sum 'being the value of certain crops of clover, oats, and beans, the whole valued at 242l. and also 20l. for the right of *cropping* the lands from the 18th of June.' That right is to

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attach in the use and enjoyment of it in 1801. This therefore is a specific sale of these two distinct things, and nothing is to be *recouped* by way of rent or otherwise. I am unwilling to look at the sense which the appraiser had of the terms, because it is the sense of the parties themselves, expressed in the written receipt, which is to guide us, and they may afterwards have come to another agreement."

GROSE, J. also felt some difficulty, but concurred in opinion.

LAWRENCE, J. "On the receipts I have the same opinion as the Lord Chief Justice. The defendant, *Daniel*, was tenant of the farm from 1798 to 1801. His tenancy was not expired, and he was liable to pay the rent for 1800 and 1801 from Lady-day to Lady-day, and if he had sown the crop for 1801 he would have been entitled to take it. After having sown a crop for 1800, in the month of June, he comes to an agreement with the in-coming tenant, who was in possession of the *sward* already; and the tenancy having begun for that year, he sells the crop as he would sell it to any one else; but he had also a further right of sowing and cropping the land for the next year, and he sells that also; yet he must be considered as still continuing tenant to Sir *Philip Molyneux*. It is said, however, that in that case he would pay rent for three crops, and receive only the value for two, but I think that is not so. In the course of 1800 he calculates what would be the expence of cropping, and he thinks fit to take 20l. as the consideration for the right to the whole. If he had given up the tenancy to Sir *P. Molyneux* he could not have to pay the rent, but I do not think the tenancy was to be changed."

LE BLANC, J. "The case has all along struck me differently. The whole depends upon the manner in which we are to consider the receipt for the money paid in June, 1800. It is clear to me that *Daniel* has paid all that he ought to pay. He paid for the *crop* of 1798, and also rent from Lady-day; in 1799 he paid rent and gathered the crop; in 1800 he received money for the crop sold to *Petrie*;

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and thus he pays for two years' rent, and receives value for two years' crop.—I consider him as having no occupation of the farm for 1800; for *Petrie* being in possession of the grass-land, is desirous of having the arable also, and I consider the sum paid as a premium for letting him in as tenant. The receipt is for 20l. as a premium for the right of cropping the arable land from June; and if *Petrie* was in possession of the *sward*, and *Daniel* gave up the *crop* of the arable, he gave up the whole occupation of the farm, and it would be very hard to make the *defendant* pay 31l. when he has received only 20l."

RULE ABSOLUTE FOR A NEW TRIAL.

THE KING *versus* BOSTON.—*Saturday, Feb.* 11.

PENDING an action at law the defendant *files a bill against the* plaintiff *for a discovery of monies paid to him, praying also an injunction, which being obtained, is afterwards dissolved, upon the answer denying those payments. The* plaintiff *in equity then prosecutes an indictment against the* plaintiff *at law for perjury in his answer: Held, that the prosecutor is a good witness to prove the perjury, for he cannot make use of the conviction to his own advantage either in the action at law or in the suit in equity.*

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THIS was an *indictment* for perjury committed by the *defendant* in an answer to a bill in the court of Exchequer, filed by one *Briggs*, the prosecutor of the indictment. The *defendant* had brought an action of assumpsit against *Briggs* for cattle sold to him. *Briggs* paid into court all the money demanded, except 100l. and then filed a bill in the court of *Exchequer*, stating, that he had paid that money to *Boston* at two several times. That *Boston* called at his house, and his (*Briggs*'s) wife counted out and paid to *Boston* 80 guineas on the 9th of August, 1796, and that he, *Briggs*, afterwards paid him 20l. on the

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15th day of October in the same year. To this bill *Boston* put in an answer, denying the payment of the money. There was a supplemental bill and answer still denying the receipt of the money, except 10l. which the *defendant* had stated before to have been received. Upon this the injunction, which had been previously obtained, was dissolved, and the action of *Boston* v. *Briggs* stood for trial in the cause paper at the last assizes at *Cambridge*, immediately after the present indictment for perjury. The perjury assigned was in the denial of the payment of the money in the second answer by *Boston*. *Briggs*, the prosecutor, and his wife, were the principal witnesses to prove the perjury, the other witnesses only speaking to some circumstances slightly corroborating their testimony. The *defendant*'s counsel objected to *Briggs*, the prosecutor, as an inadmissible witness, because, as the action was still pending, the court of *Exchequer* would grant a perpetual injunction if the *defendant* was convicted of the perjury, and he had therefore a direct interest in procuring the conviction of the defendant. The LORD CHIEF BARON, before whom the case was tried, over-ruled the objection, and the *defendant* was convicted.

SELLON, Serjt. in *Michaelmas* term, obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground of the inadmissibility of the prosecutor as a witness, and also of the balance of evidence being in favour of the *defendant;* to which rule cause was now shewn.

WILSON, *for the crown.* "The witness *Briggs* was a good witness upon the indictment. The rule as to the admissibility of witnesses has been laid down with more accuracy, and considerably more narrowed in modern than in former times, so that objections generally go rather to the credit than the competency of the witness. In the *King* v. *Whiting* * a woman who had been induced to sign a note of hand by the fraud of the defendant was

* 1 *Salk.* 283.

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rejected as a witness, because her conviction would influence the jury. This case weighed with Lord *Hardwicke* and with Chief Justice *Lee* in the cases of the *King* v. *Ellis* *, and the *King* v. *Nunez* †. But in the *King* v. *Bray* ‡ these authorities were somewhat shaken, and they were afterwards over-ruled by Lord C. J. *Lee* in the case of the *King* v. *Broughton* §. Afterwards, in *Abrahams* v. *Bunn* ‖, this matter was very thoroughly discussed upon principle, by Lord *Mansfield* in giving the judgment of the court, and he coincided with Lord *Hardwicke*, who held, in a former case, that the "question of a civil action being "the same with that in a civil cause in which the witness "is interested, goes *generally* to the credit; unless the "judgment in the prosecution where he is a witness can "be given in evidence in the case where he is interested." In *Bent* v. *Baker* ¶ it was laid down, that the party to be precluded from giving evidence must have either a certain interest in the cause, or the verdict must be capable of being given in evidence for him. In *Smith (qui tam)* v. *Prager* **, which was argued for the purpose of trying the question over again, Lord *Kenyon* says, speaking of the case of *Bent* v. *Baker*, that it lays down a *certain* rule by which he had always endeavoured to guide his directions to juries in cases of perjury. Though he adds with great modesty, that he did not perhaps always decide rightly. It is therefore clear upon these authorities, that *Briggs* would be a good witness; for by convicting *Boston* of perjury he could not gain any advantage in the action at law, since the verdict could not have been given in evidence on the trial of that cause. But it is said, that although he has no interest at law to render him incompetent, yet he might avail himself of the verdict in equity and some *nisi prius* cases have been cited for the purpose of shewing this; but some of these are before the case of *Bent* v.

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* 2 *Str.* 1104. † 2 *Str.* 1043.

‡ Rep. *temp. Hard.* 360, and *Abrahams* v. *Bunn*, 4 *Burr.* 2251.

§ 2 *Str.* 1229. ‖ 4 *Burr.* 2251. ¶ 3 Term Rep. 27.

** 7 Term Rep. 60.

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Baker, and all before the case of *Smith (qui tam)* v. *Prager*. These cases go upon the ground, that the Judge at *nisi prius* ought to take into his consideration what would be the consequences of the verdict at law, in courts of equity; an inquiry which the Judges at *nisi prius* are neither willing nor very competent to enter into; they rather endeavour to keep the provinces of the two courts as distinct as possible. But upon this point, as to the effect which it would have in equity, there is a distinction where the indictment is against a party to a suit in equity and against a witness: for where there is an action at law, and then an indictment and conviction of a witness, the court of equity will afterwards see whether there was any thing to entitle the plaintiff in equity to relief. This distinction between witness and party in equity runs through the whole of the cases. In the case of the *King* v. *Dalby* * the indictment was against a witness. In the

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* *Peake, Nisi Prius* Cases. 12.

This was an indictment against the *defendant* for perjury in a trial on an action brought by *A. Greenwood* against the *prosecutor* for usury, in which action the *defendant* was the only witness, and a verdict was obtained against the prosecutor. The first witness called was *Priestman*, the prosecutor.

LAW, *for the defendant*, objected to him as an incompetent witness. He had filed a bill in Chancery against the *defendant* and *Greenwood*, stating the perjury, and that the verdict was obtained on perjury, and praying an injunction. He cited the *King* v. *Minitonè* *, *sittings after Trin. term*, 1785. "This was an indictment for perjury committed in an answer in Chancery to an injunction bill filed by the prosecutor.

BULLER, J. who tried the cause, thought that the prosecutor was an incompetent witness, because by convicting the *defendant* of perjury the witness would certainly obtain a perpetual injunction.

Lord

* This, Lord ELLENBOROUGH now said, was cited from a MS. note at nisi prius, taken by himself, and that it was before the case of *Smith (qui tam)* v. *Prager*.

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King v. *Eden* * the *defendant* in the original action, against whom the verdict went, was held an incompetent witness, because he had not paid the debt and costs. The *King* v. *Minitone* cited in the *King* v. *Dalby*, was before the case of *Bent* v. *Baker*. And in *Bartlett* v. *Pickersgill* † "the *defendant* bought an estate for the *plaintiff*. "There was no writing, nor was any part of the money "paid by the *plaintiff*. The *defendant articled* in his own "name, and refused to convey, and by his answer denied "any trust. Parol evidence was rejected, and the bill "was dismissed. The *defendant* was afterwards indicted for "perjury, tried at *York*, and convicted upon evidence of "the *plaintiff*, confirmed by circumstances, and the *de*"*fendant*'s declarations. The *plaintiff* then petitioned "for a supplemental bill in the nature of a bill of review, "stating this conviction; but the petition was dismissed, "because the conviction was not evidence, 22d Nov. 1762 ‡." That case shews that the *plaintiff in equity* could not gain any thing by this conviction. The mode pointed out is by obtaining a perpetual injunction; but I

Lord KENYON. "This witness is certainly incompetent, as he is clearly interested in, and may derive a benefit from the event of this cause; for should this *defendant* be convicted, he being the only witness to support the verdict, the court of Chancery, upon having this new matter stated in a new or supplementary bill, would order the money to be refunded *."

* *Espinasse*'s Cases at *Nisi Prius*, 97.

† *Burr.* 1225.

‡ Lord ELLENBOROUGH, C. J. here read Mr. Justice *Aston*'s note of the case of *Bartlett* v. *Pickersgill*, which exactly agreed with the statement by Lord *Mansfield*, in *Burrows*. The verdict went upon "circumstances confirming the testimony and proof by other witnesses."

* It was stated, that the *defendant* had demurred to the bill, which was dismissed with costs, and since that time the *money had been paid* by the prosecutor.

am informed by several eminent practitioners in the court of Chancery, that a *perpetual injunction* is never granted but upon admissions in the answer, and that if the *defendant* denies the bill the *plaintiff* cannot obtain a perpetual injunction."

[Lord ELLENBOROUGH, C. J. "Your information goes only as to *perpetual* injunctions, not to all injunctions. Have you been able to find any cases where a conviction of perjury has been tendered in Chancery as a ground for an injunction?"]

"I have not been able to find any cases where the court of Equity proceeds as Lord *Kenyon* states in the *King* v. *Dalby*; and though his authority is very great, I cannot help thinking he must have been somewhat mistaken. The safer rule in all these cases certainly is to repel all these presumptions arising from equitable claims, which may, in a subsequent event, spring out of the case; and to leave it entirely to a court of Equity to decide, upon a review of all the facts, whether relief ought to be granted or not, and to consider what credit is then to be given to a party having convicted another of perjury in his own case *."

SELLON, Serjt. *contrà*. "Certainly it must be admitted that there is a distinction between *influence* which goes only to the credit of the witness, and *interest* which renders him incompetent; and it must also be admitted that the courts have of late inclined rather to let the objection go to the credit than to the competency. This as a general principle, deducible from the cases cited, cannot be denied. But upon the principle mentioned in the *King* v. *Dalby*, and the *King* v. *Minitonè*, *Briggs* must be considered as an incompetent witness. The distinction taken on the other side, that in the *nisi prius* cases referred to, the indictments were against *witnesses*, and not against parties to the suits in equity, makes for the

* He then went upon the other ground, as to the preponderance of the evidence, which it is unnecessary to state here.

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present *defendant*. For if it is to be admitted, that a person in such a situation cannot be a witness against a witness *a fortiori*, he cannot against one who is also a party, and against whom his interest tends much more strongly to produce a bias in his testimony. In the cases relied on by the other side there was no suit *pending* in equity, but the objection was only that the conviction might probably be made use of, and the verdict acted upon by a court of Equity; but the rule now contended for is, that, whenever a suit in equity is pending, the *complainant* in that suit cannot be a witness on any indictment for perjury in the answer to that suit. Prior to the cases in the time of Lord *Hardwicke*, and in *Burrow*'s Reports, in all cases of perjury and forgery, the party injured in the one case, and the party whose deed was forged in the other, could not be admitted as a witness. This is so stated by Lord *Holt* in the *King* v. *Whiting* *. There are indeed some cases in which the evidence of the party *interested* is not rejected, but they are only those in which the witness cannot *ex necessitate* be dispensed with. In forgery this rule still prevails; and the person whose deed is forged is never called. The *King* v. *Nunez* † is directly in point with this. But the *King* v. *Whiting* was not a case of perjury; and though Lord *Mansfield* says, in *Abrahams* v. *Bunn*, that Lord C. J. *Lee*, in the case of the *King* v. *Broughton*, overruled these cases, yet it appears from the Report in *Strange* that Lord *Mansfield* was somewhat mistaken; for the *Lord Chief Justice* there said, 'that he would give no opinion at present further than observing that in *Nunez*'s case the suit in the Exchequer was then depending, whereas the suit *here* in equity seemed to be at an end.' That distinction also applies in the present case, and in *Bartlett* v. *Pickersgill* the bill was dismissed and at an end.

[LAWRENCE, J. "Is not this *suit* at an end? The bill was for a discovery, and they got it."]

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* Lord *Raym.* 396. † *Strange*, 1043.

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SELLON. "They might have gone on for an account; the bill prays an account. Suppose the bill had been in part heard, and a decree was about to be made, then, according to the case of *Needham* v. *Smith*,* "if a witness is convicted of perjury after a hearing, the party will be entitled to a rehearing.' The case of the *King* v. *Minitone* is precisely in point with the present. The case of the *King* v. *Pepys*‖ was after the suit was ended. It It is there expressly stated, 'Upon this answer the *bill was dismissed*, and the present prosecution founded.'

[Lord ELLENBOROUGH, C. J. "Whether the bill is dismissed or in force, have you any case where a court of equity has looked at a *conviction* of a witness for perjury in order to guide its decree? Though it is strange that Lord *Kenyon* should have stated what he did, yet at *nisi prius* he might have been taken by surprize."]

SELLON. "In *Fanshawe's* case† it is said, 'In an indictment for perjury, on an answer in Chancery, resolved first, the *plaintiff* in Chancery is no witness pending the bill; secondly, he is after the bill dismissed, 4 *W.* and *M.* However I have been unable to discover, upon the inquiries that have been made, what is the present practice of Chancery; but it seems, from the tenor of the cases, to be taken for granted that the conviction would be looked at in Chancery‡."

Lord ELLENBOROUGH, C. J. "The objection to this verdict, in order to obtain a new trial, is taken upon two grounds: first, upon the incompetence of the witness *Briggs*; and, secondly, upon the weight of the whole testimony being in favour of the *defendant*, and against the conviction under this verdict. As to the competency of the witness it is said, that he has an interest in obtaining a conviction of perjury, because that conviction,

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* 2 *Vern.* 464.—‖ *Peake's Nisi Prius Ca.* p. 138.—† *Skinner*, 327.

‡ He then referred to Mr. *Hargrave's* notes on *Co. Litt.* 6, b. and quitting this point of the admissibility of the witness, went upon the other as to the preponderance of the evidence.

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when obtained, would be available to him, the witness, in his suit in equity; either by inducing a decree in his own favour, or by laying a ground for a supplemental bill, or in some other way, according to the practice of the courts of Equity. No case, however, has been cited to us to shew that a court of Equity would have looked at such a conviction, at all, for that purpose, or that it could, in any manner, be so available to the party. This position is not only destitute of authority on the one side, but there is a direct authority on the other, *Bartlett* v. *Pickersgill*, that upon a case of this kind it would not be received in a court of Equity for the purpose to which it is said it would be applied. And it is but reasonable to presume that it would not; for indeed it would really be to render a party, in a suit in equity, entirely his own witness, and enable him to set up what defence he chose; by disabling the other party from impeaching his answer by an indictment for perjury. To consider this person as an incompetent witness would be to break in upon the course of judicial authorities now long established. In *Bent* v. *Baker* the principle was taken as settled, that if the proceedings in the cause cannot be used for him, he is a competent witness, although he may entertain wishes upon the subject; for that goes only to his credit, and not to his competency." The same rule has been adopted in the case of *Smith* (*qui tam*) v. *Prager*. The only existing *anomaly* which forms an exception to the general rule, is the case of a party whose name is forged to a bond, note, or other instrument; who cannot be a witness on an indictment for forgery committed in respect of that instrument. This I consider as a perfectly anomalous case, and on what principle it has obtained, it is not for Judges in a court of law to consider at this day. It is rather for the legislature itself to inquire, whether it is a distinction that ought to continue to be acted upon; and until it is revised and altered by the legislature, which I shall not anticipate will be the case, we are bound by the decisions to abide by it.

As to the second point, his Lordship observed, that

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although there appeared some room for a doubt, it was not for the court to vacate the verdict of a jury merely because there was some cause of doubt. He examined the evidence, and concluded that neither of the grounds relied upon were sufficient to entitle the *defendant* to a new trial.

GROSE, J. "Two points have been made in this case of the most serious importance, both as to the fact and as to the law; for I should be very sorry to have that disturbed which I have hitherto, upon mature consideration, deemed to be settled and well-established law. I have always understood, that a person who is not *directly* interested in the event of the cause, or who cannot make use of the verdict in evidence for some after purpose to serve his own interest, may be a witness. And it has been said, that the party here has an *interest* in producing the conviction of the *defendant*. But there has been nothing adduced to shew to my mind that he could not be a witness on account of any direct interest that he has in the case, or that the conviction could be of any use to him in his suit in equity."

LAWRENCE, J. "It cannot be necessary to say more after the two points have been so fully gone into, than that, on the point of law, I agree with my brethren; and that on the point of fact, though there may be some difficulty in the case, it has been very properly decided by the jury."

LE BLANC, J. "The point of law must depend upon the party having some interest in the cause; and it does not seem that the party concerned in the suit in equity, and the *defendant* in the suit at law, could have taken any benefit whatever from this conviction."

RULE FOR A NEW TRIAL DISCHARGED.

1804. SMITH *versus* WOODWARD.—*Saturday, February* 11.

IN debt on bond, with a profert, *the plaintiff must produce the bond at the trial or be non-suited, notwithstanding it is in the hands of the* defendant, *and he, upon notice to produce it, neglects or refuses to do so. If it be lost out of the* plaintiff's *possession after declaring, he must amend his declaration, by declaring as on a lost bond.*

SMITH *versus* WOODWARD.

THIS was an action of debt on bond, in which the *plaintiff* had declared with a *profert*. Issue was joined on *non est factum*. The bond being, in fact, not in the hands of the *plaintiff*, but having been taken by force from him, and being in the possession of the *defendant*, the *plaintiff* gave notice to him to produce it at the trial, which he neglected to do; and the *plaintiff* proceeded to give parol evidence of it, and to shew that it was taken from him by the *defendant*. This was objected to by the counsel for the *defendant*; but the Lord Chief Baron MACDONALD, before whom the cause was tried at the last assizes for *Cambridge*, over-ruled the objection, and the *plaintiff* had a verdict.

It was moved in *Michaelmas* term last, by SELLON, *Serjeant*, to set this verdict aside, and enter a nonsuit on the ground of a mis-direction of the Judge; for that nothing could satisfy the *profert* in the declaration but the actual production of the bond. A rule was granted accordingly, and now

B. HART, *for the plaintiff*, shewed cause, and urged that notwithstanding the *profert* in the declaration, it was not absolutely necessary to produce the bond in this case for it might be true that the *plaintiff* had the bond to produce at the time of declaring, but it might be lost in the interval between that time and the trial; and he would be without remedy unless this secondary evidence were admitted. But

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THE COURT held, that after the *profert*, the production of the instrument declared upon was absolutely indispensable, and that the *plaintiff* should have amended his *declaration* if the bond were lost before the trial. They therefore made the rule absolute for a new trial, it being drawn up in that way, as SELLON, Serjeant, stated, by mistake; and although he urged that he took the objection at the trial, and moved for a nonsuit to be entered, they would not help him, but granted the rule only as for a new trial, in order that the *plaintiff* might in the interval move to amend.

IN THE COURT OF CHANCERY,

IN HILARY TERM.

EAST INDIA COMPANY *versus* DONALD.—*Jan.* 31, 1804.

IF an answer contains a positive denial to the facts stated in the bill, there cannot be a decree against the defendant *upon the evidence of one witness only, unless the facts so preponderate over denial, that greater credit must be given to the witness than to the answer, recollecting that the latter is an interested party.*

Although the delivery up and cancelling of a charter-party takes away a remedy at law, yet it rather assists a claim for equitable relief.

EAST INDIA COMPANY versus DONALD.

THIS was a bill filed by the *East India Company*, praying that the defendant might be decreed to pay to them the sum of 1000l. with interest, as money had and received to their use, under the following circumstances:—

Messrs. *Mitchell* and *Crawford* being owners of the ship *Fort William*, had chartered the same to the *East*

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India Company for a voyage to *Madras*; on which occasion Captain *George Simpson* applied for the command. After some negociation this application was acceded to, on *Simpson's* executing a bond to *Mitchell* and *Cranford*, binding himself to pay to them, previous to the commencement of each voyage, the sum of 1000l. as a consideration for his being appointed captain. The ship performed her first voyage in 1791, and in 1792 *Mitchell* sold his interest in her to the defendant *Donald*, who, in a short time subsequent called upon *Simpson* to resign his command; but after some negociation, it was at length settled that *Simpson* should retain his situation, on executing a bond to the *defendant* in the same terms as the former, which was given up and cancelled upon the transfer of the property.

In the charter-party which was executed previous to the ship's sailing on this voyage, dated on the 17th of September, 1792, a covenant was inserted, that neither the owner or master, or any part owner, should on any account sell, or permit any other person to sell, by themselves or their agents, any situation, office, or command, in the said ship, or should receive in any manner whatever, any sum of money, or gratuity, in respect of any place or office in the said ship, or in consideration of any person or persons, in such place or office, resigning the same; and that in case any such owner, part owner, or master, shall so offend, then that the money or gratuity thus received shall be considered as received for the use and on the account of the said *United Company*, and such offending party shall pay and account to them for the same, or the full value thereof, with interest; and the party shall be bound to make a full discovery in equity thereto, and shall not plead in bar of such demand.

Previous to the ship's sailing from the River, *Simpson* paid to the *defendant* the sum of 1000l. as the consideration for his appointment, and accordingly performed the voyage. After the return of the ship she was chartered for a second voyage by the *East India Company*, *Simpson* still retaining the command; but the first voyage not being

successful, he did not, previously to sailing on the second, pay to the defendant any sum of money whatever. Some short time after the completion of this second voyage, the *defendant* desired *Simpson* to accompany him to the house of his agent, when he asked for a paper parcel he had left there, saying at the same time to *Simpson*, "In case I had died before your return, this would have been "delivered to you;" and the *defendant* at the same time put the parcel into his pocket. Shortly afterwards he repaid to *Simpson* the sum of 1000l. which the latter had paid to him previous to sailing on the first voyage, the *defendant* at the same time saying, "There is your "money again, and I hope you will resign the command "of the ship."

Subsequent to this, the charter parties for both voyages had been cancelled and the freight on both settled and paid to the defendant.

In consequence of the particulars of the transaction coming to the knowledge of the East India Company, the present bill was filed, praying that the defendant might be declared to have received this money for their use and on their account, according to the covenant in the charter-party, and praying that he might be directed to pay this sum of 1000l. to the plaintiffs, with interest from the time that he had received the same.

The defendant, by his answer, stated, that the bond, executed by *Simpson*, was not for the payment of any sum of money in consideration of his being appointed to the command; but that he should resign the command of the ship at the end of each voyage, if required, and that he should not interfere in soliciting for, or appointing to any command in the said ship. That he was entirely ignorant on what terms *Simpson* was appointed captain by *Mitchell*; and that he continued him merely because he was in the command. The answer also stated, that all accounts between the *plaintiffs* and the *defendant* had been settled and adjusted, and the charter-party given up and cancelled. He denied that *Simpson* had ever paid him the sum of 1000l. or any other sum of money, in the

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manner, or on the account stated in the bill, but that the same was advanced to him, the defendant, merely by way of loan, which was repaid; and that this was the cause of the defendant's conduct, by which he meant nothing more than to express, that in case of his death, he had provided for the repayment of what had been so lent to him. The defendant also stated, that he had appointed the purser and other officers of the ship, without any gratuity, fee, or reward whatsoever.

Captain *Simpson* was examined as a witness, and on his cross-examination for the defendant, he positively denied, that he ever lent or advanced any sum of money to the defendant by way of loan, either of the amount stated, or any other sum; that it was agreed between the defendant and him, that he, the deponent should continue in the command of the ship, and that previously to his sailing on each voyage, he should pay to the defendant the sum of 1000l. as a consideration, or gratuity, for his appointment; he also admitted the facts stated in the bill.

The LORD CHANCELLOR, after hearing counsel on both sides, said—"It is clear that money paid upon such a transaction as the present is stated to have been, might be recovered at law, but where a specific re-delivery of the thing given is necessary, relief must be sought in a court of equity. The language in the covenant in this charter-party is rather obscure; but the true meaning of it must be, that where a party receives a sum of money in violation of his contract, and a suit is instituted for the purpose of taking that money from him, it is not to be considered as if it were the enforcing of a penalty against him, but as money had and received to the use of the plaintiffs; and if the remedy in this case be not taken taken away by the cancelling of the charter-party, and if the fact be that this sum of 1000l. was really paid upon the consideration stated in the bill, and confirmed by the examination of *Simpson*, then the defendant must be a debtor for so much money had and re-

ceived for their use: nor will the circumstance of his having paid it back again destroy their right to enforce this demand; for the forfeiture of the covenant was an immediate consequence of the original payment. In this case, if the charter-party had not been cancelled, both an action at law, and a suit in equity might be maintained, for the East India Company were not privy to the transaction between the *defendant* and *Simpson*.

"The fact of *Simpson*'s having paid 1000l. to the *defendant*, while the charter-party continued in force, is most incontestibly proved, and the *defendant* must be liable to this demand, unless it be clearly proved that this sum of money was paid to him, not as a gratuity for *Simpson*'s retaining the command of this ship, but as a loan which was to be repaid at the convenience of the *defendant*.

"It is necessary here to consider the facts as stated by *Simpson* in his examination. His deposition is wholly in support of the bill, and he most confidently denies ever having paid this sum of money to the defendant, or any other sum, as a loan; but that the same was paid as a gratuity or consideration for his retaining the command of the ship, which is the very transaction prohibited by the charter-party. There certainly is no proof of the allegation in the bill, that *Donald* told *Simpson* he might continue in the command upon the same terms as before he purchased the ship; but *Simpson* upon his cross examination, says, that it was agreed he should continue in the command, and that previously to the commencement of each voyage, he should pay the sum of 1000l. which he says he did pay previous to sailing on the first voyage. Nor does the *defendant* in his answer deny one of the allegations in the bill, that *Simpson*, in performance of the agreement, executed a bond for the regular payment of 1000l. previous to each voyage. With respect to the paper parcel there is no proof of what it contained, for *Simpson* never had it; and he says that he never saw it after the defendant put it into his pocket,

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saying, " You see what I intended to do for you in case of my death previous to your return."

" The circumstances under which this money was paid back are certainly very extraordinary. It is clear that *Simpson* could have no right to demand its re-payment. He had not even a receipt for it. The bond is not produced; nor was there any conversation between the two voyages, which indicated any demand on the part of *Simpson*; nor any intimation from the *defendant* to him, that he considered this sum as a loan which he was to repay: and it was not until five years had elapsed, viz. on the 6th of September, 1798, that the money is returned; and it must be observed, that the repayment is then connected with a hope that he, *Simpson*, would resign the command. If *Simpson* lent this money, he did it without any document or security; and it is not a little singular, that the *defendant* should permit the matter to rest, until after the completion of the second voyage, without any communication or explanation on the subject. The *defendant* positively denies that the transaction was as stated in the bill. *Simpson* as positively swears in support of the statement, and as positively denies that he ever paid any sum of money to the *defendant* by way of loan.

" If the charter-party had not been destroyed, an action at law might have been brought, and *Simpson* called as a witness; the necessary consequence of which must have been a verdict for the *plaintiffs*.

" It is a painful necessity imposed upon a Judge sitting in a court of equity to decide on which side the truth lies, where there are such positive contradictions. In this court the *defendant* has the protection of his own conscience, but he must be considered as an interested party, and you must contrast his evidence with that of one who has no interest at all. It is true, that if a bill is filed in this court for a discovery only, you may read the answer on a trial at law, and the *defendant* consequently has thus the advantage of laying his own evidence before a jury, al-

though he could not be examined *vivâ voce*. In this court, the general rule is, that, if the answer contains a positive denial to the case stated in the bill, and it is contradicted by one witness only, as in this case, there cannot be a decree against the *defendant*, unless the circumstances so preponderate that greater credit, upon the testimonies of both being fairly balanced, must be given to the depositions of the witness than to the answer of the *defendant*, laying aside all recollection that the oath of one of the parties is that of an interested person.

"Lord THURLOW, I think rightly, said that if the rule of this court was to give equal credit, unless where circumstances give greater probability to one side, and a jury is called upon in such a case to decide, there must be an evident inconsistency, because the *defendant* cannot be heard, unless you order his answer to be read, and then it appears with the prejudice arising from his being an interested party, which in this court you dismiss from your mind.

"In this case do circumstances so outweigh as to call upon me to decide against this *defendant*? An enquiry at law is certainly less favourable in its principles for him, but if he desires it, there must be an issue to try the question. It is therefore necessary, before I express my opinion, that I should know whether he desires an issue."

Mr. ROMILLY said, he had advised his client not to desire an issue.

Lord CHANCELLOR. "Then I am of opinion that there are circumstances enough in this case to call upon me to decide against the *defendant*, notwithstanding the circumstance of there being only one witness to contradict his answer.

Upon the second point,—Whether these *plaintiffs* are entitled to any relief, the charter-party being delivered up, I am of opinion that this court must refuse to act in many cases in which it now does act, if such a circumstance were permitted to make any difference in the case; indeed I think the circumstance of the charter-

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party being cancelled rather aids the claim for equitable relief.

"The *defendant* must consequently be decreed to pay this sum of 1000l. to the *plaintiffs*, with interest thereon, during the time that it was in his hands."

Ex parte GARLAND *in re* BALLMAN, *a Bankrupt*.

A testator directed that his trade should be carried on after his death by his wife, for the benefit of herself and children; and for enabling the wife so to do, he authorized his trustees to permit her to retain the stock in trade upon her giving notes of hand bearing interest, and also to advance out of his personal estate 600*l. as a capital to carry on the business. The widow becoming bankrupt, the trustees were permitted to prove the notes for the stock in trade, and the* 600*l. advanced. These proofs the Chancellor, on a former petition,* ordered to be expunged, reserving the point, Whether, where a testator directs his executor to carry on his trade, not only the part embarked in obedience to that direction, but the whole be liable to all the debts to which the concern is subject? Held, that the part directed to be embarked alone is liable, contrary to the decision in* Hankey *and* Hammond.

Ex-parte GARLAND *in re* BALLMAN.

THIS petition came on, upon a point reserved for further argument, at the sittings after Trinity vacation, 1803; and the question was, Whether, where a testator directs his trade to be carried on by his executor after his death, and a sum of money, part of his personal assets, to be advanced for that purpose, the immediate sum directed to be advanced, or the whole assets are or are not liable to the creditors of the trade in the case of bankruptcy?

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* Law Journal, vol. ii. p. 106.

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Mr. ALEXANDER *and* Mr. DANIELL, *for the petition*, contended that the whole assets were liable. There is no authority to be found upon this point, but the case of *Hankey* v. *Hammond*,† decided by Lord *Kenyon*, when master of the rolls, who there said, "Wherever a will contains such a direction, general creditors have a right not only to come upon the immediate property embarked in the trade, but also upon the general assets, for the testator's estate can never stand in competition with general creditors." It is also an established proposition, that any person, even though his name be unknown to the parties, who shares profits accruing under the directions of a will similar to this, is liable to all debts; and *Hankey* v. *Hammond* goes the length of deciding, that where an executor carries on trade as executor, he is personally liable to all debts contracted in the course of that trade, and, in the event of insolvency, even to bankruptcy. An executor in such a case must clearly have a right to resort to the whole of the personal property for his indemnity, even though a part of it only was directed to be embarked in the trade; and if an executor has this right, creditors must surely have it also. If the testator's estate, which is to be increased by the accumulation of the profits of the trade, be not liable, and the property of the executor insufficient for the payment of the debts, then the very profits, which have become part of the testator's estate, would escape from that liability to which they would be necessarily subject if the testator were living.

The great difficulty arises from an executor never being able to proceed with the general administration of the assets, where a testator directs part of his property to be so employed, because if he administers the assets he parts with that fund from which he is to provide for his own indemnity. But this is a consequence of the testator's own directions, and cannot exonerate his estate from its legal or equitable liabilities. Suppose it were decided, that

† *Cooke's* Bankrupt Laws, p. 67.

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the part advanced only is liable to creditors, then the executor must incur a personal liability for the excess of the debt, for which he would have no means of indemnity, and this would be the utmost inconvenience which could exist. But if an executor, in any case, thinks fit to administer assets, he always incurs a personal liability and relinquishes his lien upon the assets. The inconvenience would not be so great in practice as apprehended, for the executor would always have it in his power to take care of himself.

In France and many other parts of the continent there is a species of copartnership, in which each person brings in a limited specified capital, and is liable only to the amount he brings in, but he receives profits upon that amount only. The testator's estate in this case, however, receives profits not upon the amount directed to be advanced only, but the whole. Besides, no such thing as a copartnership with a limited liability is known to the law of England; but if this partial liability is to be established now, it must go upon exactly the same principle as the foreign law. Besides, in France, and the other countries where this practice prevails, each partner is compelled to register the amount of what he embarks in a public register office, so that every person, before he gives the house credit, may not only know the amount of the whole capital, but also the exact amount to which the liability of each partner is pledged.

Under all these difficulties, Lord *Kenyon*'s principle is certainly the best. He first applied the particular fund embarked, and in case that was not sufficient, then the general assets.

Mr. RICHARDS *and* Mr. TOLER, *on the other side.* "This trade is given by this will clearly as a legacy, and the circumstance of the executrix being a legatee makes no difference. She takes the trade in a separate capacity, and must be considered completely as an indifferent person. She is the legatee of the trade for an express purpose, and not for the general benefit of the estate. And where there is a specific bequest of a trade, shall an exe-

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cutor, because the trade which he has thought fit to carry on proves unsuccessful, deprive the other legatees of what they are clearly entitled to under the will. Mrs. *Ballman* is evidently a mere legatee in respect to this trade, and the transaction amounts to nothing more than a mere lending or borrowing of the money under the directions of a will. An executor is often ordered by the will of a testator to lend money to a third person to assist him in trade, and would not that be a debt due to the testator's estate? This ought, in fact, to be considered as a dealing between strangers, although all claim under this will, and this widow, must be considered as carrying on the trade *per se*. But why may not a testator sever the liability of his assets for the purpose of his executor's trading? The bequest here is referable to a specific purpose, and the general assets are not benefited, as has been argued, but only the particular legatees. But it is said that an executor should provide for his own indemnity, by not administering the assets, but can he be authorized to do this for any indefinite length of time? Certainly not. The rights of creditors will not be at all limited by holding that particular, assets alone are liable, because, before they deal with him, they know him to be an executor executing the trusts of a will, and they should refer to it to see how far he is liable. There clearly is such a severance by the very terms of the will as to distinguish this legacy of the trade from all connection with the general assets, for Mrs. *Ballman* is permitted to apply the profits in any manner she thinks fit for the benefit of her children, and not to the augmentation of the general fund. The case of *Hankey* v. *Hammond* is very distinguishable from this, for that will contained a general bequest of all the testator's personal estate to be employed in trade for the benefit of his wife and children. The purposes there were general, and not as in this a specific bequest to the widow, to enable her to carry on the trade until the son should be able to conduct it himself.

Mr. ALEXANDER, *in reply*. "In this case, I admit that the trade is a specific legacy under the will, and that the

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son, when he enters upon the concern, is to pay for the value of the stock; but this will then form a part of the general assets, and tend to augment them. Suppose a will, in which a legacy of 50,000l. is given to a particular person, and a trade is directed to be carried on for the augmentation of that legacy until the legatee comes of age, would not that legacy be liable to debts contracted in the course of carrying on the trade for its augmentation? It is precisely this case.

LORD CHANCELLOR. "I remember the case of *Hankey* v. *Hammond* very well. It was in fact hardly argued, and I doubted the decision at the time. Indeed, upon reference to my note book, I see that I added the words *qu. tamen* to it. In this case, a testator by his will has directed a particular trade to be carried on, in which part of his property is already embarked: he directs a further part to be also employed in it; and he then arranges the disposition of all the other parts of his property. If he had continued alive carrying on this trade, clearly all his property would be liable to debts; but the question is, Whether it is so now? Both Lord *Thurlow* and Lord *Kenyon* concurred, that if an executor carried on trade, even under the directions of his testator, that he was liable to bankruptcy; and it is difficult to say that he shall not have a right to indemnify himself from the application of all the personal property of the testator, in the execution of whose directions he incurred his liability. But the situation of the creditors is simply this: they lose their remedies against the dead man, and get the security of the living executor. To those who are creditors before the death of the testator, his personal effects are clearly liable as far as they go, and there is a clear equity in the executor to provide for his own indemnity; but the rights of both depend upon the continuance of those equities. If the executor of a testator chuses to undertake the risk of carrying on the trade upon the credit of the appropriated fund merely, it is not competent for him to say, I will place myself in this situation of personal responsibility, but I will also provide for my own indemnity, by retaining

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the general assets from the due course of administration. If it were so, no will with such a direction could ever be executed, and it would embarrass beyond conception all the transactions of life, if, after legacies were paid, the executor could retain a right to demand them back again at any distance of time in order to provide for his own personal indemnity. Creditors dealing and giving credit, after the death of a testator, clearly can have no right to disturb the administration. There has been no case either before or since the decision of my Lord *Kenyon* in *Hankey* v. *Hammond;* and of him I may truly say, that although, either from the peculiar turn of his mind, or his habits of thinking, he seldom developed the principles of his decisions to others, yet no judge, perhaps, ever so generally decided right. My decision must trench upon the doctrine laid down in *Hankey* v. *Hammond,* but the difficulties attending that doctrine were neither stated, nor considered there. Is this court to hold, that where a testator has made such a will as this, all is to stand still, while these directions are in a train of execution? or are the other directions to be so checked that an eventual liability is still to hang over them? Much inconvenience would attend both ways of considering the question.

"The only way of removing the difficulty is, in my mind, by considering the case with reference to two classes of creditors: 1st, Those who were such before the testator's death; and, 2dly, Those who have become creditors since. The first class, by their own acts, may have their demands paid, by enforcing their rights against the testator's assets in a course of administration; and if they permit them to hang over, until the division of the assets is made, they have not much right to complain. The second class must, I think, be conceived to know the extent of the testator's property embarked in the trade, and if they chuse to deal with an executor under such circumstances, it is their own fault if that property turns out to be insufficient.

"This way of considering the case seems to me to be

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attended with the fewest inconveniences; and I am therefore of opinion, contrary to my Lord *Kenyon*'s decision in *Hankey* v. *Hammond,* that the property embarked under the will of the testator alone is liable."

THOMAS HATCH *and* WIFE *versus* CLIFFE HATCH, *Esq. Executor of the Rev.* GILES HATCH, *deceased, and others.*

A CONVEYANCE by a ward to her guardian of a rectory, in consideration of esteem and friendship, and for his care during minority, tho' executed after attaining 21, *decreed to be fraudulent, upon the general principle of the Court, not to permit such transactions between persons bearing such relations to each other.*

T. HATCH and Wife *versus* C. HATCH.

THIS bill was filed for the purpose of setting aside a conveyance made by the wife of the *plaintiff* previous to her marriage, of the rectory of *Sutton,* in the county of *Surrey,* to the Rev. *Giles Hatch,* deceased, under the following circumstances:—Mr. *Cliffe,* the father of the *plaintiff,* the wife of Mr. *Thomas Hatch,* dying seized of the manor and advowson of the rectory of *Sutton,* devised the same by his will to his daughter, in fee, who, at her father's death, had attained the age of about four years; a half sister by a former mother being married to the Rev. *Giles Hatch,* he was duly appointed Miss *Cliffe*'s guardian, and received the sum of 130l. per annum, for her maintenance and education during her minority. Miss *Cliffe* came of age in 1779; some time previous to which a vacancy having occurred in the rectory by the death of the incumbent, Mr. *Giles Hatch* was thereupon presented to the same. In 1780 the accounts of the receipts and payments during the minority of Miss *Cliffe,* were finally settled by Mr. *Giles Hatch,* who up to that time continued to receive the 130l. a year allotted for her maintenance. In 1783 Miss *Cliffe* was prevailed

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upon by the persuasion of Mr. *Giles Hatch*, to execute an absolute grant in fee of the rectory of *Sutton* to him, subject to his life interest; on which occasion Mr. *Thomas Hatch*, an attorney, and who afterwards became the husband of Miss *Cliffe*, prepared the deeds, and attested the execution. The consideration in the deed was stated to be the friendship and esteem which Miss *Cliffe* had for Mr. *Giles Hatch*, on account of the great care he had taken of her during her minority. Some time after this transaction Miss *Cliffe* was married to the *plaintiff*, Mr. *Thomas Hatch*, who was brother to Mr. *Giles Hatch*.

The bill stated that Miss *Cliffe* from her birth had laboured under the infirmity of deafness to a very great degree, and that at the time she executed the conveyance, she understood it to be merely a grant for life of the rectory to *Giles Hatch*, and never had any intention of giving him the fee. The bill therefore prayed that the conveyance might be set aside as fraudulent.

Mr. *Giles Hatch* died in the year 1796, and by his will devised to the *defendant, Cliffe Hatch*, whom he also appointed his executor, the rectory of *Sutton*, with other estates, subject to the payment of three legacies of 1000l. each to his three daughters. Previous to his death he sold the next presentation to the rectory for the sum of 2,100l.

The ATTORNEY GENERAL and Mr. COX, *for the plaintiffs*, contended, that this conveyance must be set aside, the principle of the court not permitting such transactions in the case of guardian and ward, solicitor and principal, trustee and *cestui que* trust, to stand. That Mrs. *Thomas Hatch* never intended to give more than the mere presentation to Mr. *Giles Hatch*, and from her infirmity of deafness was prevented from understanding the effect of the deed she had executed. That at the time this deed was executed Miss *Cliffe* was living in *Giles Hatch*'s house, he still retaining all the influence over her which a guardian may be supposed to have over

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a ward; and that there was no subsequent confirmation in this case, the church being full until Mr. *Giles Hatch*'s death, and Mrs. *Hatch* supposing that she had merely granted it to him for life. That in cases of fraud the lapse of time makes no difference, nor does the death of a party add any confirmation to the transaction, and they cited *Shirley* and *Ferrars*, in the Exch. 3 *P. W.* 78; *Waring* and *Pearce*, cited in *Cray* and *Mansfield*, 1 *Ves.* 381; and also *Hylton* and *Hylton*, in 2 *Ves.* 54; *Griffin* v. *Deveuille*, *Nov.* 10, 1801, *Osmund* v. *Fitzroy*, in 3 *P. W.* 128; and *Wells* and *Middleton*, printed cases in the House of Lords in 1785.

Mr. Mansfield, Mr. Romilly, and Mr. Hart, *for the defendants.* "This deed has now stood twenty years, and the grantee is dead. It is true that in *Waring* v. *Pearce*, the party was dead, but the simple circumstance of death makes no difference. It is the length of time which has elapsed, not only since the execution of the deed but the death, which makes it material; nor is it true, as has been argued, that in cases of fraud time makes no difference. This lady remains unmarried four years after coming of age, and is then married to the very attorney who prepared the deed which is now attempted to be set aside. During all the interval from their marriage to the present period they never dispute it, until the present bill is filed, when the grantee and one of the two witnesses are dead.

"None of the cases which have been quoted necessarily go to the length of deciding that a deed, executed by a ward in favour of a guardian, can be set aside after a lapse of twenty years. In this case, the grantee has, during all this period, dealt with it as his own, and made it the subject of family arrangement among his children; and if there be any fraud in the case, one of the present *plaintiffs* was unquestionably a party to it. But in such a case as this, lapse of time is alone a sufficient objection to there being a decree for the *plaintiffs*."

[Lord Chancellor. "Length of time is in all cases evidence of the fairness of a transaction."]

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Mr. Mansfield. "Even if this lapse of time is considered under any analogy to the statute of limitations, it must certainly afford the strongest presumption against the *plaintiffs'* case. It is alleged in the bill, that this lady thought she was merely giving the next presentation to Mr. *Giles Hatch*, but it cannot be denied, that Mr. *Thomas Hatch*, then her solicitor, and now her husband, must have known the real purport and object of the deed, for he prepared it, and he must certainly have recollected the nature of this conveyance: for at a period long subsequent to its execution, when he wanted to sell the manor of *Sutton*, as appears from the correspondence, and found that the manor would not sell so well as if the advowson of the rectory were still annexed to it, he writes to his brother, Mr. *Giles Hatch*, to know, not what he would take for the surrender of his life interest, but for the perpetuity; and when they differ about the value, the *plaintiffs* remain quiet until the year 1796, when Mr. *Giles Hatch* died. It is not true, as has been argued, that no circumstances can make this deed good, from the relation of the parties at the time it was executed, for every presumption arises in its favour from the lapse of time and the death of the parties. It is no argument that Mrs. *Hatch* did not, during the time of her being sole, and after she attained 21, know the real nature of this deed, for she must, at all events, be supposed to have understood it upon the marriage, and the matter might have been then contested. If the deed had been then set aside, the parties would have been put upon the same footing as if it had never been executed, but that cannot be done now. The *defendant*, *Cliffe Hatch*, the devisee, under the will of *Giles Hatch*, has taken this estate, subject to legacies, from which he would have been exonerated, if this suit had been decided before the testator's decease.

"Mrs. *Hatch* was clearly competent to make this deed, and if she was misled by any one, it was by the man who afterwards became her husband, but was then her solicitor, and by his brother, who is since dead, and the husband

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ought not now to benefit by a fraud to which he w himself a party.

"The Court certainly watches such transactions w great suspicion, but there is no principle which says, th a ward after coming of age, may not make some compence to a guardian for his care and attention, es cially when that guardian had married the ward's o sister."

The ATTORNEY GENERAL, *in reply*, adverted to t case of *Cole* and *Gibbons*, in 3 *P. W.* 290. which, he gued, questions the power of subsequent confirmatio at least it goes the length of deciding that mere acqui cence, or lapse of time, are not alone sufficient to es blish such a deed.

LORD CHANCELLOR. "It is impossible, in this ca not to lament the conduct of both Mr. *Giles* and *Thomas Hatch* towards this young lady, whose prope by every principle of honour and honesty, they bound to protect, instead of converting it to their interests; and I am sorry to be obliged to state th persons, one of whom bore the sacred character clergyman, and the other, one of not inferior import an officer of this court. The father of this lady when she was only four years of age, leaving her the nor of *Sutton*, then worth about 15,000l. and this re at that time worth 200l. a year; and the care of her son and this property was entrusted to Mr. *Giles H* during her minority. He received from this pro 130l. per annum for her maintenance, and had als benefit of the rectory, to which he presented hims vacancy having happened during his guardianshi appears that this young lady laboured to a very gre gree under the infirmity of deafness, and it consequ required much greater care and attention to see th understood perfectly the nature of every thing tha did, than a person otherwise circumstanced. If gentlemen did not pay that care and attention, their duct has been the most dishonest and base that I eve

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with in a court of justice. She attained the age of 21, in the year 1779, her guardian then being in the enjoyment of this living, and consequently understanding the value of the property, the improveable nature of which no one could know as well as himself. The accounts prove that, though this lady had attained the age of 21, yet Mr. *Giles Hatch* seems to have felt the necessity of continuing his care, for he retains the possession of her property, and receives the 130l. *de anno in annum*. It is consequently clear, that the relation of guardian and ward had not ceased in that clear and distinct manner which is necessary to establish this deed; and to say that it can stand would be to go against all the cases which have been decided: for this is a stronger case than all others which have ever occurred; it being clear, that she had no command over her property at the time that she executed this deed. If marriage had been in contemplation at the time, and these parties were disposed to act fairly towards this lady, it was surely incumbent upon them not to permit her to part with a property which was peculiarly valuable with reference to the manor.

"Mr. *Giles Hatch*'s accounts, as guardian, were settled in 1780, yet still all the relations continue, up to the period of the marriage. Is it proved that when she executed this deed, she knew the value of what she was conveying away? No.—Was any particular caution used to explain the deed itself to her? Nothing of the sort is proved.—The *plaintiff*, *Thomas Hatch*, at all events, grossly abandoned his duty, for he certainly sacrificed one of his two clients.

"In such a case, the wisdom of the court is apparent in saying that it is almost impossible in the cases of guardian and ward, solicitor and principal, trustee and *cestui que* trust, that such a transaction shall stand supported on the ground of antecedent benefits conferred by the one upon the other. It must ask, was this done as an act of volition, freely and spontaneously? Was this lady neither misled by undue kindness, nor actuated by an apprehen-

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sion that if such an act were not done, difficulties might arise in her recovering possession of the other part of her property.

"I am convinced that the Court would be lending its assistance to fraud in 999 out of 1000 cases, if it were to support such a transaction as the present; and if a bill had been filed to set it aside in 1780, there would have been no manner of difficulty in the case. But now length of time is set up in bar of this demand. Lapse of time is always of great consequence, and in every case some evidence that the transaction was not fraudulent. But it appears here that all the relations of guardian and ward, and all the influence of the former, were carried down to the moment of the marriage with *Thomas Hatch*. She was evidently a child until that event, and was then transferred with her property, by the hands of her guardian, to this *Thomas Hatch*. If the case were clear at the time of coverture, neither that change of situation nor the lapse of time can make any difference. The Court cannot suppose a confirmation. If sole, Mrs. *Hatch* would be clearly entitled to relief, and all the difficulty is, in fact, thrown in the way by her being connected with this husband. But where relief is given by the policy of the law, it is not a sufficient objection that the benefit of that relief goes to a party through his connection with a person really entitled who does not himself deserve it: for, where the court relieves upon the policy of the law, it has been decided that the fraud may be undone, though it even operate to the benefit of the party causing the fraud. This instrument must, therefore, be delivered up to be cancelled. If the wife had survived the husband, and this had been her bill, I would have given the costs, but I shall not do it here; and if there was any settlement made upon this marriage, this rectory must be subject to the trusts of the settlement."

THOMAS COLES *v.* JAMES TRECOTHICK, *Esq.* WILLIAM COLES, *and* WESTGARTH SNAITH.—*Jan.* 26.

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1st. Decree for specific performance—purchase by a father whose son was a trustee for the sale of defendants' estates: Held good, there being no positive proof of fraud.

2d. Question, whether an auctioneer's clerk, under a general authority to act in his master's absence, could sign a contract for sale of an estate according to the statute of frauds: Held, that he could, where the party selling knew that he was so to act.

3d. Whether, where the clerk of an auctioneer signs the contract as a witness for his master (the agent authorized to sell the estate), he can be considered as a contracting party according to the statute of frauds: Held, that he could.

THE bill stated that the *defendant Trecothick,* being seized in fee of the manor of *Addington,* in *Surrey,* with the perpetual advowson and tithes of the whole parish of *Addington,* and of the capital mansion-house and park, &c. estimated at the value of 90,000l. and upwards, and being indebted, amongst other persons, to *Thwaites* and *Wheelwright,* upon bonds for 17,780l. 2s. 8d. proposed to convey all his estates at *Addington* aforesaid, to the *defendants Wm. Coles* and *Westgarth Snaith,* in trust to sell the same for payment of debts; and a defeazance was indorsed upon a warrant of attorney to confess judgment in an action upon the said bonds, declaring that no execution should issue within 2 calendar months from the date, but on default made in one of the acts there specified, viz. that Mr. *Trecothick* should deliver, at his own expence, to *Walton,* the solicitor, for the parties holding the bonds, within a month, a complete abstract of title to the *Addington* estate, the investigation whereof should be at *Trecothick*'s expence; and also, that within the remaining month he should, with Mrs. *Trecothick* his wife, execute a conveyance of the said estate to the *de-*

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fendants, Coles and *Snaith*, the holders of two of the bonds, all costs of which should be also paid by him, in trust, to sell the same by public auction or private contract, together or in parcels, without the interference or interruption of Mr. *Trecothick*; and out of the proceeds first, to pay off the incumbrances affecting the estate; secondly, to satisfy all charges incurred in making out titles; and thirdly, to discharge the principal and interest on the three bonds; and lastly, after full indemnity to the trustees, to pay the surplus to Mr. *Trecothick*. The judgment to stand as a security not only for the payment of the principal and interest on the bonds in case of failure in the acts aforesaid, but also for the due performance of the covenants to be contained in such conveyance; as also for the payment on demand of the principal and interest secured by the said judgment, as should not within ten calendar months be realized under the sale of the *Addington* estate, in case such conveyance be executed within the time specified.

That there being several incumbrances on the said estates, no conveyance of the legal interest, on equity of redemption, was executed by the said *James Trecothick*, and the right of the trustees is merely an equitable interest.

That in order to prepare for the sale, the estate and premises were surveyed and valued by *Smith*, an auctioneer, with the approbation of the trustees, and under the directions of the said *James Trecothick*, when the same were estimated at upwards of 100,000l. and *Trecothick* having resolved on selling by auction, wrote a letter to the trustees, desiring that, in case a purchaser at or above the price of 110,000l. should not offer, the estate should be bought in, to be afterwards disposed of in lots.

That the estate was accordingly put up for sale on the 7th of *July*, 1802, at 109,500l. but no bidders appearing, it was determined to sell the same by lots, the management of which *Trecothick* undertook, with the consent of the trustees, and the same was divided under his direction into twenty-two lots. That previous to the time of the second sale, the said *James Trecothick* and

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Smith settled the prices at which the several lots were to be sold, or if not sold, bought in, and afterwards disposed of by private contract.

That upon the said premises being put up for sale, several of the lots were sold, but others, and particularly lot 1, consisting of the manors of *Addington* and *Temple*, with the perpetual advowson of the vicarage of *Addington*, and the mansion-house, park, &c. containing together 420 acres, were bought in for the said *James Trecothick*, at the sum of 19,350l. That several of the lots unsold were afterwards disposed of by private contract, under the direction and with the approbation of the said *James Trecothick*.

That on *Smith*'s being about to go out of town, and his informing Mr. *Trecothick* that his clerks would enter into any contracts for the disposal of the unsold lots, *Trecothick* expressed himself perfectly satisfied, and about the month of *October* called several times on the *defendant*, *William Coles*, and expressed a wish that he or the *plaintiff* would purchase lot 1; but the said *William Coles*, conceiving it to be inconsistent with his character of trustee, absolutely refused the offer.

That at a meeting of the trustees, which was attended by Mr. *Debary*, the solicitor for Mr. *Trecothick*, and *Walton*, the solicitor for the trustees, in order to consider what should be done with the lots unsold, Mr. *Debary* said, "that Mr. *Trecothick* had desired him to offer lot 1 to the said *William Coles*, or the *plaintiff*, his father, at 20,000l. being very desirous that one of them should be the purchaser;" to which *Walton* replied, "that as to *William Coles* standing in the situation of a trustee, he neither would or could become the purchaser, whatever the *plaintiff* might do as an indifferent person.

That the said *William Coles* absolutely refused, and never had any interest in the said purchase, but having communicated Mr. *Trecothick's* wish to the *plaintiff*, he determined to accept the same. That the *plaintiff* being out of town, his son (the *defendant*) *William Coles*, met

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Mr. *Debary,* on the 6th of *November,* at *Smith*'s house, and informed him the *plaintiff* would become the purchaser.

That on the same day the sum of 20,000l. was offered by a Mr. *Young* for the said lot, whereupon *Smith* asked Mr. *Trecothick* whether the *plaintiff* or *Young* should have the lot, to which he replied, "You may do as you please;" to which *Smith* answered, "Then it is Mr. *Coles*';" and Mr. *Trecothick* said "Yes."—That on the afternoon of the same day, *Walton,* who also acted as solicitor for the *plaintiff,* called at *Smith*'s, and entered into a contract, in writing, for the purchase of the said lot 1, which was written on the back of the particulars of sale, and is partly as follows :—

"I agree to purchase lot 1, in this particular, agreeable "to the annexed conditions, and to give for the same the "sum of 20,000l.—Signed for *Thomas Coles,* Esq. *Wm.* "*Walton,* 6th *Nov.* 1802.—Witness *Evan Phillips,* for "Mr. *Smith,* agent to the seller."

That *Walton* signed the contract as the agent, and on the behalf of the *plaintiff,* and the said *Evan Phillips* was the clerk of *Smith,* and transacted his business in his absence, and signed and witnessed the same on the part of *Smith,* the agent for the vendor Mr. *Trecothick*; that the *plaintiff* paid a deposit of 10l. per cent. upon the purchase money, according to the conditions of sale; and that a receipt for the same was given, signed by *William Glover,* a clerk of *Smith*'s, and duly authorized by him. That the *plaintiff* is desirous to complete his purchase, but that the *defendant, Trecothick,* refuses to perform the same.

The bill, therefore, prayed, that the said contract might be decreed to be specifically performed, and carried into execution.

ANSWER.

The *defendant, Trecothick,* by his answer, admitted he had executed the bonds in the bill mentioned, for the payment of the said debts by instalments, which were as-

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signed to *Thomas Coles* the *plaintiff*, —— *Goodwin*, and *Wm. Coles*, the *defendants*, sugar brokers, and to *Sykes*, *Snaith*, and Co. bankers. That having made default in the payment of the first instalment, owing to heavy losses on his estates in the island of *Grenada*, several meetings were held with the holders of the bonds, when it was agreed that the *defendant* should be allowed two years for the payment of the debt, on his executing a conveyance to the *defendants*, *William Coles* and *Snaith*, of his said estates, in trust, to sell the same at the end of two years, if the said debt should not be before paid. That the said trustees, or their solicitor, imputing some unavoidable delays to the *defendant* in preparing the abstract of his title, occasioned by the title deeds not being in his possession, determined to impose harsher and more rigorous terms upon him, and therefore prevailed upon *Thwaites* and *Wheelwright* to arrest the *defendant*, contrary to the understanding come to between them.

That the *defendant* thereupon offered bail, but the sheriff declined accepting the same without the consent of the *plaintiff*'s attorney, who refusing to interfere, the *defendant* removed himself to the *King's Bench*, and that under the pressure of such circumstances, though possessed of property much more than sufficient to pay all his debts, being wholly in the power of the *plaintiffs*, he was constrained to accept the terms dictated to him by *Walton*, their solicitor, and did accordingly sign such defeazance as stated in the bill.

Admits that the said estates were surveyed and valued by *Smith*; that he consented to *Smith*'s appointment, and occasionally communicated and gave directions relating to the disposal and arrangement of the lots. That in this he acted with the concurrence and assent of the trustees, by whom *Smith* was originally appointed; and that he agreed to the prices fixed by *Smith*, though less than under any other circumstances he would have taken; and that he signed authority to *Smith* to sell at those prices.

That *Walton*, the solicitor for the trustees, took upon himself the management of the sale, and that several of

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the lots bought in were afterwards disposed of by *Smith* by private contract, but that the *defendant* never did authorize or empower *Phillips* and *Glover*, *Smith*'s clerks, to make contracts on his behalf; and that upon *Smith*'s mentioning his intention to go out of town, he told the *defendant* he would leave with his clerks directions how to act; but the *defendant* never understood that they had any authority from their principal to sign any agreement for disposing of any of the lots unsold; nor did *defendant* ever give his assent or any authority to such clerks disposing of the estate, or signing any contract for the sale of the same.

That the *defendant* never expressed any wish to *William Coles*, that he or his father should become the purchaser of lot 1, or make any offer to him. That he has been informed that *Walton* intimated to Mr. *Debary*, that it was the wish of *William Coles* to become the purchaser of part of the estates unsold, and that he had been deterred from bidding at the sale solely because he was a trustee; but that he, *Walton*, was of opinion, that as the sale was over, and the trust-deed had never been executed, there was no impropriety in such a purchase. That the *defendant* being anxious to finish the business, and to avoid the consequences of the judgment against him, desired Mr. *Debary* to offer the said lot to the *defendant*, *Coles*, for 20,000l. That on Mr. *Debary*'s making such offer, *Walton* observed, that he had no authority to treat, so the *plaintiff* could not be expected to give more than 19,500l. for the same, being what was originally asked.

That the *defendant* told Mr. *Debary* he believed the said lot was worth 25,000l. and ought to fetch 23,000l. if sold as it then was, having been so informed by *Driver*, an eminent surveyor. That the *defendant* had never heard that *Walton* was authorized by the *plaintiff*, or by any person on his behalf, to offer the said sum of 20,000l. nor doth he believe that the *plaintiff* ever gave any authority to *Walton* to purchase the said lot. That the *defendant*, *Thomas Coles*, told *Smith*, in the hearing of

Debary, that *he* was authorized to offer 19,500l. and no more, but his father would give 20,000l. sooner than any other person should have it.

That *Young* told the *defendant* that if *Smith* had not informed him that no offer would be accepted, he would have advanced his bidding, being authorized by his principal to do so. That the *defendant* understanding from *Smith* that neither of the parties would advance on the bidding for 20,000l. did say, that Mr. *Coles* must do as he pleased, meaning that *Coles* might exercise his judgment thereon: but if the *defendant* had understood the whole of the conversation between *Young* and *Smith*, he would not have expressed himself so. Denies that he ever did declare his assent to *Smith*'s giving the preference to *Coles* in any manner, having no other intention than it should be sold for the best price.

That the *defendant* never authorized or empowered *Phillips* or *Glover*, or, on that occasion, *Smith* to enter into or sign such agreement on his part; and he has been informed that *Phillips* and *Glover* told *Young* that they had not any authority to treat for lot 1, nor had any one but *Smith*.

Admits, that when he first received an account of such contract being signed he neither acquiesced in, nor dissented therefrom, nor was he sensible that an injurious preference had been given to the *plaintiff* until *Young* informed him of the circumstances, and that thereupon finding such contract was not made between competent parties, or signed by those legally authorized, he refused to confirm the same, which he was the rather induced to do from receiving a letter from *Young*, dated 13th *November*, 1802, in which *Young* offered him 25,000l. and to pay for the timber at a valuation.

That *defendant* has no reason to believe that *Walton* was authorized to pay the sum of 2,000l. as a deposit by the *plaintiff*; and that such payment cannot be considered in part-performance of the agreement, as the same was received by *Glover*, who was not legally authorized to receive the same.

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Saith, that by an act of parliament of the 29th *Charles* II. entitled, "An act for the prevention of frauds and perjuries," it is enacted, *that no action shall be brought on any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized.* And *defendant* avers, that the said agreement was not, nor was any memorandum, notes or note of the said agreement, in writing, signed by *defendant*, or by any other person or persons by him thereto lawfully authorized, and therefore insists to have the benefit of the same.

ANSWER of defendant, W. Coles.

The *defendant, Wm. Coles*, by his answer, saith, that Mr. *Trecothick* called upon him, and said that he wished *defendant* would purchase lot 1 of the said estate, but that *defendant* having accepted the trust, conceived it would be improper in him to purchase any part of the estate, and therefore absolutely refused. That he never did in any manner purchase, or consent, or agree to purchase, or ever authorize and empower *Walton*, or any other person, to purchase, nor ever meant or intended to purchase the said lot, or any part of the said trust estate or premises whatsoever. And he denies that he hath now or ever had any beneficial or other interest, either directly or indirectly, in the purchase of the said estate.

Plaintiffs' proofs.

Edward Smith, in his examination for the *plaintiff*, stated, that he had general authority to sell the said estates and premises by private contract or public auction, and that it was fully understood between the *defendant, Trecothick*, and him, and the *defendants* the trustees, that such of the lots as were unsold should be sold by the deponent by private contract, and most of the lots remaining unsold were accordingly afterwards, under such understanding, sold by the deponent, or his said clerks in his

absence from home, and assented to and confirmed by the said *defendant, Trecothick,* as valid and proper.

Saith, that upon *defendant Trecothick*'s inquiring what was to be done upon deponent's absence from town, he informed him that he transacted great part of his business through his clerks, *Phillips* and *Glover,* who acted for him in all his business whenever he was absent, and would, as they did on all other like occasions, enter into any contracts, and dispose of the unsold lots, if purchasers offered; at which *defendant, Trecothick,* appeared perfectly satisfied.

That on a meeting of the parties on the 26th of *October,* 1802, Mr. *Debary* said, that *defendant Trecothick,* had desired him to offer lot 1 to *William Coles,* or his father the *plaintiff,* at the sum of 20,000l. and that the *defendant* was very desirous that one of them should be the purchaser, when *Walton* made such reply as stated in the bill. That upon the sum of 20,000l. being offered for the said lot by the *plaintiff,* and also by Mr. *Young,* deponent asked Mr. *Trecothick* "whether *Thomas Coles* or *Young* were to have it," to which he replied, "You may do as you please;" but deponent declined to decide; upon which *defendant Trecothick* then said, and afterwards repeated in the presence of *Glover,* that deponent was to do as he pleased; to which deponent replied, "Then, Sir, it is Mr. *Coles*';" and *defendant* then said, "Let Mr. *Coles* have it."

That *Phillips* and *Glover,* deponent's clerks, have for many years been appointed by deponent, in his absence, to manage his business, and to sign, make out contracts, and perform all necessary matters relating thereto, and in consequence thereof the contract in question was signed by *Phillips,* as deponent's clerk or agent, and that it has been deponent's invariable usage to appoint him so to do, as deponent could not otherwise transact his business; and that it is usual in the course of the business of an auctioneer and agent for the sale of estates, to appoint confidential clerks to enter into or sign contracts for, and

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in the absence of their principals; as such business could not otherwise to any considerable extent be carried on.

Saith, that *Phillips* and *Glover* being made acquainted with the prices fixed by the *defendant*, were, as on all other occasions, in the course of deponent's business, to enter into contracts in his absence; and that the *defendant* was informed that the *plaintiff* had agreed to purchase the estate both by letter to him and *Debary* his solicitor, written by *Phillips*, and accompanied by a copy of the contract and signatures. That the *defendant* did not object to the sale until after several applications made to the *plaintiff* through the *defendant*, *Wm. Coles*, to request the *plaintiff* would give up his purchase, and until he had refused so to do.

Phillips, in his examination, stated that some of the unsold lots were afterwards sold by *Smith*, or deponent and *Glover*, and to which the *defendant* never made any objection. That he and *Glover* were appointed generally by *Smith* to enter into and sign contracts, and to do all business in his absence; and that deponent received instructions from *Smith* when he left town to enter into and sign contract for lot 1 to the *plaintiff*. That the contract is made according to the usual mode of transacting such business, except that deponent sometimes does not sign his name as a witness to the contract where he receives the deposit money, as he then signs the receipt for such deposit.

Mr. MANSFIELD, Mr. RICHARDS, and Mr. TROWER, *for the plaintiff*.

"This is a bill for the specific performance of an agreement under circumstances which make the case very simple. Mr. *Trecothick* being an embarrassed man, without any immediate means of relieving himself, makes the agreement with his creditors, by which his estates were to be brought to sale, and he is entrusted by the trustees with the superintendance and controul of the whole business. The sales cannot be objected to on the score of price, for they are, in fact, extremely beneficial to

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him, for the whole rental of the estate was only 1360l. a year. But a question is to be raised upon the statute of frauds, whether the persons who signed the contract had any authority to do so. Mr. *Trecothick* has decided that question, for upon *Smith*'s representing his manner of doing business in his absence, he acquiesces in it, and approves the price which was to be given. But the contract itself answers all that is required by the statute. It is signed by *Walton*, agent to *Coles*, and witnessed by *Phillips* for *Smith*, as agent to Mr. *Trecothick*. The signing of the receipt for the deposit money would itself be a contract. The agency of *Smith* is not doubted, and there is no complaint but that a sufficient price has not been obtained. The agreement was in fact made, but if it is not such a one as sanctioned by the statute, a court of equity will not execute it; and this brings it to the point as to the authority of the contracting parties."

LORD CHANCELLOR. "There is no evidence on either side that *Walton* had any authority from *Thomas Coles*, the *plaintiff*, to sign this contract; but as it strikes me at present, *Phillips* and *Glover* were duly authorized within the statute."

Mr. MANSFIELD. "It may perhaps be objected, that there is no mutuality to support this contract, *Phillips* having signed as a witness; but the case of *Welford* and *Beazley*, 3 *Atk.* 503, decides that it is of no consequence where the name is signed, whether at the top or bottom, or in the body of the instrument, and he must be here considered as the agent and a contracting party; and this was also decided in the case of *Stokes* and *Moore*, in a note of Mr. *Cox*'s, to the case of *Hawkins* v. *Holmes*, 1 *P. Wms.* 770, where it is said, that the signature required by the statute is to have the effect of giving authenticity to the whole instrument; and where the name is inserted in such a manner as to have that effect, it did not much signify in what part of the instrument it was to be found."

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LORD CHANCELLOR. "I have some doubt of the doctrine in that case."

[Mr. ROMILLY said that Mr. *Cox*'s note was not perfect.]

Mr. MANSFIELD. "A sale by auction is not within the statute of frauds. An auctioneer putting down the name of a bidder and the price, being properly authorized to do so, is a signing within the reasoning of the act. It is true that Lord Chief Justice *Eyre*, at *Nisi Prius*, held, that such a case was not within the act, upon the ground, that in the case of *Simon* v. *Motivos*, 3 Burr. 1921, decided in the *King's Bench*, the agreement was for goods, but the one before him for an estate. The sole objection is, that instead of *Phillips* signing as agent for Mr. *Trecothick*, or signing merely without any addition at all, he has put the word *witness*, but the rational explanation must be, that he signed it as a party. He could not sign, as witness, for *Smith*, who was not present; but when he adds, *for Mr. Smith, agent for the seller*, he must have meant as agent to him who was a party to the contract. To satisfy the statute there must be a contract in writing, and a signature of the party; but in *Welford* v. *Beazley* (1) the woman who signed was no party, but knowing the contents of the deeds, it was held, that her signature, as a witness, satisfied the statute, her interest making her a party. This agreement also has the confirmation of part performance by payment of the deposit. See *Main* v. *Melbourn*, 4 *Ves. jun.* 20.

Mr. ROMILLY, Mr. STANLEY, and Sir THOMAS TURTON, *for the defendant Trecothick.*

"The question, whether this agreement is duly signed, is not the only one, but also, whether, under all the very peculiar circumstances of this case, the Court ought to

(1) *Vide ante.*

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interpose. Mr. *Trecothick*, though perfectly solvent, was, at the time of this transaction, an embarrassed man, and was forced into this arrangement under circumstances of peculiar oppression. Both the trustees were creditors, and though with great affectation of delicacy, *William Coles*, the *defendant*, declined to be the purchaser of this lot; yet he appears to have been the agent of the intended purchaser, his father, and endeavouring to get the estate for him at as low a price as he could. Two persons proposed the same sum for the same lot, but was there any competition? Surely *Smith* ought to have inquired whether either would advance; and it is clear that Mr. *Trecothick* was not truly informed of all the circumstances of the case. There was concealment both by *Smith* and *Wm. Coles*. The latter was in a situation to acquire information, which it was his duty to have communicated to his principal. Although in particular cases a trustee may purchase from his *cestui que* trust, yet the principle upon which the Court acts in these cases affects the *plaintiff*, *Thomas Coles*, as much as *Wm. Coles*. It must be admitted, that *Young*, upon the whole, acted injudiciously, but the very circumstance of his having made an offer of 25,000l. affords good ground to insist, that this agreement should be given up to be cancelled.

"As to the contract itself, *Phillips* and *Glover* had clearly no authority to sign it; a letter from *Young* shews it, for he says that when he called at *Smith's* house, only two days before this contract was signed, both *Phillips* and *Glover* informed him that they had not any authority to treat for lot 1, nor had any one but *Smith* any authority or power to contract for or sell the same. They describe themselves as the servants of *Smith*, and not as the agents of Mr. *Trecothick*. Sales by auction differ from other contracts, and it has been decided by Lord Chief Justice *Eyre*, contrary to the decision of Lord *Mansfield*, that an agent, writing down the name of a party as a purchaser, does not constitute an agreement when relating to lands. The contract is not in fact signed by any person as agent to Mr. *Trecothick*, and the receipt

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cannot constitute an agreement. It was never insisted upon as such, and it is not stamped. In the present case there is no signature as a concurrent party, but merely an attestation as a witness: nor is there any description of the estate in the receipt as the statute requires. Besides, an agent cannot exceed his authority, and here is not sufficient proof that these clerks were specially authorized for this particular purpose. Cited *Daniel* v. *Adams*, *Amb.* 495. *Charlwood* v. *Duke of Bedford*, 1 *Atk.* 487. *Phillips* v. *Duke of Buckingham*, in *Atk.* *Johnson* v. *Scott*, in 1 *Vernon*; and *Savage* v. *Taylor*, in *Ca. temp. Talbot.*"

Mr. MANSFIELD, *in reply.* "The argument that in general cases a trustee cannot purchase, is no objection to a purchase by a creditor, and the *plaintiff* cannot be considered in any other light. There was no concealment on the part of the *plaintiff*; and with respect to *Smith* and his clerks, the manner in which Mr. *Trecothick* himself dealt with them gives them authority.

LORD CHANCELLOR. "I am clearly of opinion, under the particular circumstances of the case, that the clerks had authority within the statute."

Mr. MANSFIELD. "The question then is, have they signed? In substance they have beyond doubt; *Phillips* has signed as agent for the seller; and it is on all hands considered as a valid sale. Mr. *Debary* treats it as a sale, and *Wm. Coles* is written to so late as the 15th *Nov.* to consult his feelings as to giving it up, because *Young* had offered 25,000l. but without making any objection to the validity of the contract. And this letter is very material, for it was decided in *Tawney* v. *Crowther*, 3 *Brown's Ch. Rep.* 318, that a letter, referring to, and admitting a written agreement, though not signed, is sufficient to take the case out of the statute. Neither the case of *Daniel* and *Adams*, in *Amb.* or *Charlwood* v. *Duke of Bedford*, are at all applicable."

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LORD CHANCELLOR. "If I empower a man to sell my estate by public auction, that clearly does not give him authority to sell by private contract."

Mr. MANSFIELD. "It is not necessary that an agent should sign for or in the name of his principal a contract of this nature, though in the case of a deed it would be otherwise."

LORD CHANCELLOR. "The signature of a witness may make a draft, in the hand-writing of the party, an effective instrument."

Mr. MANSFIELD. "This was clearly Mr. *Trecothick's* own contract. It was communicated to and perfectly understood by him, and if *Coles* had not purchased, another person would at the same price: the *defendant* therefore has received no injury. But the receipt itself is a contract, for *Glover's* signature to it as agent for *Smith*, is a signing for *Trecothick*, within the meaning of the statute: and this is strengthened by part performance in payment of the deposit.

LORD CHANCELLOR. "This is a very important case, but I am perfectly satisfied upon every point, and if the parties are not, they will not be precluded by my decree from reviewing the decision I shall make. It is impossible not to look at this case with a leaning, I could almost say a wish, that it were possible to find a principle which could authorize me to set this contract aside, and give the *defendant* the unlooked-for advantage of 5,000l.; but a Judge must make a covenant with himself, that he will not permit his mind to be biassed by those feelings which might affect and influence his conduct as an individual.

"There are two questions in the cause—1st. Is this such an agreement as the Court can execute? and, 2dly, Are the circumstances which have led the parties into this contract such as will authorize the Court to refuse a decree for specific performance.

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"That there is a contract, in fact, is proved beyond all question, whether it be binding in law or not. The fairness of the agreement is not impeached in any respect, and the evidence clearly proves that Mr. *Trecothick* had the entire management of the sale, for the trustees do not appear to have interposed otherwise than by sanctioning the acts of Mr. *Trecothick* and *Smith*. In short, their power was devolved upon him. At the public sale all the lots were sold but six, the first of which is now in controversy. It is therefore necessary to see under what circumstances the contract was made. Mr. *Debary* proves that *Wm. Coles*, the trustee had a strong impression that he could not purchase. I agree with what fell from Mr. *Mansfield* and Mr. *Richards*, that a trustee may deal with his *cestui que* trust, but it is necessary that he should shew great caution and delicacy—in short, be almost afraid of embarking in the transaction. The same applies to a purchase by a creditor.

"*Walton* proves that Mr. *Trecothick* wished to sell this lot to *Coles* for 20,000l. and he must then have been aware that he would be selling for 20,000l. what he thought was worth more: but if it is made out beyond doubt that an individual clearly knows that his estates are of more value than that at which he offers them, will this Court undo a sale made under such circumstances, because he himself has fixed a price which he knew to be inadequate. *Debary* acquainted Mr. *Trecothick* with the purport of his conversation with *Walton*, and he proves that he desired the lot might be offered to *Coles*, and the business concluded as soon as possible. Throughout the whole transaction the value is set on the lots by Mr. *Trecothick* and *Smith*, not by the purchaser: so that affords no ground of complaint. There was a full communication between *Debary* and Mr. *Trecothick* upon the value of this property, and particularly about *Driver*'s having valued the lot at 23,000l. and that valuation in this case is very material, when connected with *Young*'s offer. There could be no reason why *Young* did not at once advance upon his offer, when he knew that the same sum had been bid,

but that he had no authority from his principal to do so. The *defendant*, *Wm. Coles*, now says that he was authorized by his father to bid 20,000l. but he clearly told *Smith* that his authority extended to 19,500l. only, and there certainly is so far an inconsistency in his deposition. According to *Smith*'s evidence, Mr. *Trecothick*, knowing that 20,000l. had been bid by two persons, says, 'Coles shall have it.' Not considering *Wm. Coles* (who acted in this instance as an agent for his father) in the character of a trustee, and supposing this contract had been signed by *Smith*, can this Court refuse to give the party the benefit of such a contract. I think it cannot, deciding according to law. If *Smith* had sunk any circumstance, with the knowledge of *Coles*, from the view of Mr. *Trecothick*, particularly that *Young* had offered 20,000l. that might be a ground for refusing to interpose by decreeing a specific performance, and for leaving the parties to an action at law. It was Mr. *Trecothick*'s business to consider whether more could be got or not; for *Smith* clearly meant to contract for a sale at 20,000l. *Young*'s conduct in this business is extremely material: he does not at once advance upon his first offer, when he is told another had bid the same sum, but two days afterwards he bids 1000l. more, and his letter, offering 25000l. is not written until the 15th of *November*. Mr. *Trecothick* clearly meant to sell for 20,000l. on the 6th of that month. As to inadequacy of price, the cases cited as to reversions, go upon quite different grounds. A *pretium affectionis*, or of convenience, cannot be considered as to inadequacy of consideration; and even inadequacy of price is not of itself sufficient to induce the Court to refuse a specific performance, unless it be so gross that fraud is evident upon the face of it. Accidental subsequent advantage signifies nothing. If a man contracts for an annuity, and dies immediately after, the deed cannot be set aside. Then, if this contract has been duly signed, the Court must execute it, unless there be something in the situation of the parties which ought to prevent it. A trustee may buy from his *cestui que* trust, if it be clearly

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proved there is no fraud, advantage, or concealment, and the whole transaction be fair. *Fox* v. *Mackreth* established, not that *Mackreth* might not have purchased because he was a trustee, but because from his situation he was placed in such circumstances to acquire knowledge as to the value of the property that he could not be permitted to buy. That case was therefore rightly decided, upon the ground that advantage was taken, and not upon inadequacy of price; but I have always thought that Lord *Thurlow*, Lord *Kenyon*, and the House of Lords, were wrong in refusing an issue. Where a man is a trustee of a coal-mine, he is in a situation of gaining information, which no other person can obtain, and he must prove that he has communicated all that he knows. But here the whole execution of the trust is devolved upon the *cestui que* trust, and all the requisite knowledge for ascertaining the value of the property is with him. It is true that, in all cases where the trustee is the agent for the buyer, there is a great probability of fraud; but here it is scarcely possible to feel the situation of trustee as applicable; and I think that if there ever was a case where the strict rule could be relaxed it is in this. My opinion therefore is, that there is nothing in this part of the case to withhold a decree for a specific performance if the terms of the statute have been complied with.

"The first part of the statute relates to wills. It states that a devise must be in writing, and be signed by the party. Upon this part of the act I cannot but think that the legislature must have intended a formal signature of the party, and not the bare writing of his name in the body or any part of the instrument. It then goes on to agreements, and requires, upon any contract or sale of land, there shall be an agreement, or some note or memorandum in writing, signed by the party, or some person lawfully authorized. It is difficult to say that a mere casual signature, if attested, would be good, but yet it has been so held. It can never be a signing, I think, within the act, if the party means to do some further act

towards perfecting the transaction; but it is a different thing to say that one simultaneous act is not an agreement. It has been determined in the *King's Bench* that the taking down the name of a purchaser at a sale by auction by the auctioneer, is a signing within the statute, the auctioneer being considered as the agent of both parties. It is true, that Lord Chief Justice *Eyre* differed with Lord *Mansfield*'s decision in *Simon* v. *Motivos* (1), as to an auctioneer's note. He thought it might be good with respect to goods, but not as to land. I confess that I can trace no weighty distinction between the cases. It is, however, now clear, that an agent need not be authorized in writing, and that an agreement in writing may be dissolved by parol. In *Bawds* v. *Amherst*, *Cha. Prec.* 403, there was no signing, and so undoubtedly it could not be a good agreement; for where it is only a draft and not completed by signing, though it is all in the party's own writing, it is not good; and in *Welsford* v. *Beazley*, already cited, Lord *Hardwicke* professes not to disturb that case. A man, when he signs his name at the beginning of an instrument, may not mean to pledge himself to all that follows; but Lord *Hardwicke* held, that a letter subsequently written, referring to, and promising to perform a written agreement, though not signed, is sufficient to take the case out of the statute. It is true, that where a person signs as a witness, he cannot dissever himself from that act; but I think that the case of *Welford* v. *Beazley*, decided by Lord *Hardwicke*, goes the length of proving that *Phillips* here signed as a party. It is at all times dangerous to hold, that an auctioneer can delegate his power; but here the prices are settled by the party himself, and there can be no risk. The sellers in this case consist of three persons, who unite in giving the same authority to one agent. *Smith* and *Glover* prove the authority, and that Mr. *Trecothick* himself so understood it. *Walton*'s authority is sufficiently proved by *Coles*' letter; and the language of the agreement, though in the singular number, is no proof of want of mutuality.

(1) *Vide ante.*

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"As to the point, whether the receipt is sufficient evidence of the agreement, being unstamped, that defect may be cured by a subsequent stamp, which is authorized upon the payment of an increased penalty. But it ought to have either stated or have referred to the agreement, so that it might be identified with it. If the case stood on the receipt alone, I should have great difficulty, but I do not decide this case on the receipt. Upon the whole, I am of opinion that *Smith* was the authorized agent of the *defendants, Coles, Snaith,* and *Trecothick;* that the latter had authority to agree to contracts; and that he has made the signature of *Phillips* as good as *Smith*'s.

"There must, therefore, be a decree for the specific performance of this agreement."

CHAMBERS *and* WIFE *versus* GOLDWIN.—*Jan.* 31.

Appeal from a decree pronounced by Lord ALVANLEY, *when Master of the Rolls. An assignee of a mortgage, in general cases, takes it entirely at his own risk as to what is due from the mortgagor to the mortgagee, but if the mortgagor makes no objection to the demand for a length of time, and deals with the assignee of the mortgage without objecting to the account of the original mortgagee, he cannot have a decree to surcharge and falsify against that assignee, but must resort for redress to the original mortgagee.*

Accounts settled and signed, cannot be falsified except for error; but if error be manifest, the Court will correct it, notwithstanding any stipulation between the parties. Error must be specifically charged in the bill, and proved; otherwise the Court will not open an account.

A mortgagee cannot have profit, by way of commission, for receiving the produce of the mortgaged estate.

A trustee or agent is not entitled to commission unless he remains upon the spot, and attends to the management of the estate.

CHAMBERS and WIFE *versus* GOLDWIN.

THE circumstances of this case, and the arguments of the Counsel for both parties, were very fully reported

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in the LAW JOURNAL (vol 1, p. 19 and 113) by the gentleman who then conducted that branch of the work. It came before the LORD CHANCELLOR upon an *appeal* against the decree (1) pronounced in *Hilary* Vacation, 1801, by Lord ALVANLEY, then Master of the Rolls, and from the extreme complication of the circumstances, and the difficulty of the case, was ordered by the LORD CHANCELLOR to stand over, until he could give it that reconsideration and undivided attention which it required. We now present our readers with his Lordship's decision, in which the principles upon which the Court acts in such cases, and the material points of this case, are stated with uncommon clearness and precision, and the whole freed from that labyrinth of perplexity, in which, from the length of the pleadings and the variety of facts, it was necessarily involved.

LORD CHANCELLOR. "This case comes before the Court upon an appeal from the decree made by the late Master of the Rolls, and the questions which have been agitated, arise out of circumstances which I shall shortly recapitulate. It appears that a Mr. *Ratcliffe*, to whose property the *plaintiff* has become entitled, was seised in fee of certain estates in the island of *Jamaica*, and that by deeds dated the 11th of *August*, 1781, reciting that *Theodore Foulkes* having advanced to him 9000l. currency of the island, and also entered into engagements to pay other debts for him, he had proposed to put *Foulkes* into the immediate possession of the said estates, which were also to be under the immediate management and direction of the latter. By these deeds Mr. *Ratcliffe* conveyed the premises to *Foulkes*, his heirs, executors, and administrators, in trust, to manage, cultivate, improve, and work the same, and take, consign, and sell the whole crops, rents, and produce, as he should think proper *as factor*, but on the account, and at the risk of *Ratcliffe*, and apply

(1) *Vide* 5 *Ves.* jun. 834.

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the money, first, in payment of the charges, *commission to himself, as usually received by trustees, agents, and attornies acting for absentees,* the commissions payable upon the sales as usual among merchants and factors in *London* or the island; secondly, all money to grow due on account of the execution of the trusts, and the necessary supplies and contingencies of the estate; and, thirdly, all sums which *Foulkes* should thereafter advance on account of *Ratcliffe,* or for the cultivation or improvement of the estate, *with interest at 6l. per cent.* and to pay the surplus to *Ratcliffe,* his heirs or assigns. From one of the covenants in this deed it seems to have been in the contemplation of the parties, that this estate would be able to pay off *Foulkes'* debt in four years. The deed also contains covenants, on the part of *Foulkes,* to deliver just accounts, not to sue *Ratcliffe,* and to yield the possession on repayment of the 9000l. &c.; and it concludes with a covenant, referring to the former part of the deed, as to what was to be done by *Foulkes,* who it does not appear that he was compelled either to advance money or do any one act whatever, the former part of the deed leaving it entirely to himself. One cannot very well see what it was supposed by the parties such a covenant meant, but if I were to say that it afforded any decisive remedy to the grantor, it would be advancing more than could be collected from expressions so loosely put together.

"I shall now advert to a deed of the same date as that which I have stated, which is not noticed in the proceedings. As Mr. *Goldwin* had no share in framing it, nor ever heard of it until the commencement of this suit, it would be contrary to all principles of justice to press any inference arising upon it against him. By this deed it is agreed that *Ratcliffe* shall remain in possession of the estate, and take all the trouble of management in the same degree as if the other instrument had never existed. Now, if the question had arisen immediately on the execution of these two instruments, and they were to be considered either according to the law of *Jamaica,* or of

England, it would be impossible not to say that this transaction originated in fraud, oppression, usury, and extortion; and if the case were now to be considered as between *Ratcliffe* and *Foulkes*, these deeds could not be permitted to stand for a moment.

"The next transaction was in the month of *May*, 1785, and it appears that the debt, which in *August*, 1781, was 9000l. and the discharge of which the parties then contemplated in four years, was increased to 32,000l. currency. I observe that the noble and learned Judge who pronounced the decree was struck with that circumstance; but I hardly ever knew a *West India* concern, the management of which was confided to a trustee, for the benefit of others, where incumbrance was not heaped upon incumbrance, until the whole estate at last, some how or other, became the property of the trustee. It may be true that *Foulkes* thus increased his debt by paying off other incumbrances, but, at all events, Mr. *Goldwin* could have no share in the increase; and if he is to be charged with the consequences of any improper increase of this debt, it ought to have been distinctly charged in the bill, that he might have had an opportunity of answering it; but as that is not done, there is no evidence in the case, and that is not the fault of the *defendant*, what the nature of the actual management and possession of the estate was from the year 1781. If it should have appeared that the second instrument was acted upon, and that *Ratcliffe* retained the direction and management, it would be impossible to charge *Foulkes* with any improper conduct respecting these accounts. On the other hand, if *Foulkes* had the management and possession, and lived in the island, another question would arise on the declaration in the decree.

"The deed, which was executed on the 1st of *May*, 1785, recite, that *Foulkes* had not only applied the rents, &c. according to the trust, but had made several advances, and that the sum of 32,000l. currency was then due to him. It then contains a conveyance in fee to *Foulkes* of

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these estates, subject to a mortgage, and the trusts of this conveyance are to pay 450l. a year to *Ratcliffe*, and, after his death, among his widow and children, and to apply the residue in satisfaction of all expences, commissions for himself, and of all such sums as he, *Foulkes*, should advance, and the sum of 32,000l. and interest, and as to the surplus, in trust for *Ratcliffe*, with a power to sell in one year after the determination of six years, if the whole sum of 32,000l. should not be then paid: and it was stipulated that the *accounts* should be *settled annually*. In the year 1787, deeds are executed between *Foulkes* and *Goldwin*, by which all the interest of the former in these premises, whatever it might be, was assigned to *Goldwin* for 32,000l. currency.

"The decree which has been pronounced, has given directions to surcharge and falsify as far back as the year 1785; now I confess I can see no reason, if the principle be right on which it goes back to 1785, why it should not go back to 1781. If the principle be (and I have not been able to suggest any other), that where a person takes an assignment of a mortgage in general cases, he takes it entirely at his risk as to what is due from the mortgagor to the mortgagee, I cannot help saying that it appears to me this decree ought either to have gone back to 1781, or not so far back as 1785.

"In the year 1787, Mr. *Goldwin* does that, which was a hazardous transaction for a prudent man to be engaged in, but not therefore blameable. He trusts to *Foulkes* that this sum of 32,000l. was then fairly due, for if it was not, he certainly paid his money at his own risk, and subject to the real state of the affairs between the mortgagor and mortgagee. In the year 1790, deeds are executed between *Goldwin* and *Ratcliffe*, by which the trust is prolonged, and the right of sale postponed to 1797, and the principle and interest is made payable on the *Royal Exchange* of the city of *London*. In all other respects the former trust-deed remains unaltered. In 1791 *Ratcliffe* died, and, by his will, the present *plaintiff* became entitled to his property. *Goldwin* was an executor

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in the will, it being in the contemplation of the testator, that he would take an active part in the settlement of the affairs, but he has renounced. As an executor, however, whatever he may have supposed, any species of dealing or intermeddling with the trust property, will make him more accountable than he is aware of. Since *Ratcliffe*'s death, Mr. *Goldwin* has settled several accounts with the other executors, in which he is allowed commission: I do not know whether exactly in the same manner as since he came to *England*, for I do not know, whether the commission, while he was in *Jamaica*, was on the gross or net produce; in *England*, I take it to be a commission upon the net amount. However, these accounts having been settled and signed, and the law being that, when so solemnly sanctioned, they shall not be falsified except for error, it becomes necessary to give the closest attention to the frame of the bill, to see how far, consistently with what the Court must never overlook, the allegations and proofs of the case, this decree be right or not.

"The bill charges that undue advantage was taken of the distress of *Ratcliffe*, and that if the accounts were made out and signed, they were signed by *Ratcliffe* without examining them. Now, as to circumstances of distress, there is no evidence except that of the deeds themselves; and to take these deeds as proofs of the distress of one of the parties who signed and executed them, would be going beyond what any decision in this Court will warrant. The transmission of the accounts, and the signing of them by *Ratcliffe*, cannot be taken as evidence of fraud, merely on account of its being here suggested that they were never examined, for that would be to take circumstances which, as far as they go, shew the absence of fraud, to prove its existence. No stipulation, however, that the accounts should be considered as settled, will prevent the Court from correcting error the moment that it becomes manifest. The bill then charges *Goldwin* with having paid more money to *Ratcliffe* than he ought to have done according to the terms of the trust; a circum-

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stance, however improper in itself, yet one which *Ratcliffe* and his family cannot very well be allowed to quarrel with: And then follows the most material charge in the whole bill—'That in the accounts pretended to be settled 'and signed, there are manifest errors and overcharges, 'and particularly that six per cent. upon the gross profits 'is charged for management, although *Goldwin* now, and 'for several years past, has resided in *England*, and when 'no such charges are allowed.' The bill, therefore, must succeed, if at all, by imputing the settlement of the accounts to fraud or error. I apprehend the rule of the Court in such cases to be, that you must charge and prove some of the errors which you impute, and that the Court does not open the account unless they are proved. It would be otherwise impossible for a *defendant* to defend himself. It is an objection which I once myself took before Lord THURLOW, that if you seek to open accounts on the ground of error (and error ought always to be most certain because it is error,) you must specify it; but I do not know any case in which the Court has gone the length of declaring any thing to be error, unless it be so alleged in the pleadings. It would be attended with great inconvenience if the rule were otherwise, because there may be cases in which, at the hearing, it is quite clear that there is error, yet the Court must be satisfied that the party accused had notice of the charge from the bill, and was consequently prepared to meet it. It will not do for a *plaintiff* to say that previous specification was unnecessary, and that the whole of the matter may be considered at the hearing. I therefore think that you should surcharge and falsify (and confine yourself to that) according to the error specified in the pleadings. Beyond that, the party must be left to make out his case in the Master's office, and the matter may then be brought here again.

"The bill charges that Mr. *Goldwin* is liable to losses for not having caused proper insurances to be made, and it prays, that an account may be taken of what is due to him on the mortgage, and that he may not be permitted to insist on the accounts as settled. Now the bill having specified as matter of error, the circumstances respecting

insurance and commission, while the *defendant* was resident in *England*, it must depend upon the laws of *Jamaica*, and the general principles and rules of equity. The question was taken with greater latitude by Lord ALVANLEY, for he has not confined his declaration to the commission charged by *Goldwin*, either while he was in *England* or in *Jamaica*, but extended it to that charged by *Foulkes*.

" By the laws of *Jamaica*, interest, I think, was originally ten, then eight, then six per cent. The legislature of that island seems to have been extremely anxious to prevent fraud in trustees and guardians, acting on behalf of minors and others, as well as mortgagees in possession of estates. By an act which passed in the year 1751 (the 24 *Geo.* II. c. 19) it is enacted, that all commissions for persons acting in the situation of trustees, attornies, &c. shall be 5 per cent. 2l. 10s. for receiving and 2l. 10s. for remitting, and that mortgagees in possession shall not be entitled to any commission for their management, excepting what shall be paid to the factor for his commission.

" The questions which arise upon this appeal, therefore, are, first, Whether *Goldwin* is in any degree accountable for the transactions of *Foulkes*? and, secondly, Whether the decree is right as to the commission? The first question depends upon the facts. The second is a question of law, attending, however, to the principles of a court of equity as they apply to the relations of these parties. I have with great attention endeavoured to satisfy myself upon what principle this decree can be right, so far as it charges *Goldwin* with the transactions of *Foulkes*; but I cannot. I admit it to be clear that the assignee in matters of account with the mortgagor (provided the latter has not sanctioned the mortgagee's account) has a right to have the account taken from beginning to end before he takes an assignment; but if it be made with the authority of the mortgagor, and under circumstances which shew much to be due, the latter cannot complain, since he,

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by his own act, has misled the mortgagee. I can only account for this decree's stopping at 1785, by supposing that my Lord ALVANLEY thought the deeds of 1785 authorized him to declare that the parties had then settled the accounts, and that this 32,000l. was then deliberately admitted to be true; but if *Goldwin* thought proper to trust to *Foulkes'* representations merely, he must abide by the effect of it; and if it should afterwards appear that only 5l. was then owing by *Ratcliffe*, his representatives have a right to bring both *Foulkes* and *Goldwin* before the Court, and reduce the debt to that sum. When, however, I look at this bill, which does not now impute to that account of *Foulkes'* one single error, I cannot but think that any question of error in the demand for 32,000l. is confined to *Foulkes*, and does not implicate Mr. *Goldwin*. The question has not yet been discussed in this point of view. I have had much conversation with my Lord ALVANLEY, and have not only had the advantage of calling his attention to it, but I have also the satisfaction of saying, that he now agrees with me in thinking that this decree goes too far in relation to the point upon which I am commenting; and if errors in this account of *Foulkes'* could have been charged at all against *Goldwin*, they ought to have been made distinct charges in the bill. If a person agrees with another to pay a sum of money represented to be due to him from a third person, and if that person, day after day, and year after year, never makes any objection to that demand, I think he cannot dispute with a purchaser that which he has so long appeared to approve, but he is bound to institute his quarrel with the person whom he has thus permitted to receive and to retain this sum of money for a great number of years.

"I understand it was contended at the Rolls, that if *Goldwin* could not be affected with the consequences of error in *Foulkes'* accounts, there could be no charge against him at all. But I do not agree to that. However, as the specific relief which this bill prays is against *Goldwin*, it does therefore appear to me, that *this decree is*

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wrong so far as it charges him with error in Foulkes' *accounts, and it must be rectified in that respect.* This will not preclude the *plaintiffs* from obtaining relief against *Foulkes*, and his accounts will want much explanation, for they do appear to me most suspicious indeed.

"The decree next declares, that *Goldwin* is considered as a mortgagee in possession, and can consequently be intitled to commission on no more than what he has really paid. But the charge in the bill is not that he was not entitled to commission while he was in possession in the island, but that he has claimed commission after possession ceased, and during his residence in *England*. This question divides itself into two points:—first, Is *Goldwin*, according to law, entitled to commission while in possession of the estate, and residing in the island? secondly, To what time, according to the frame of this bill, should that be limited? Now, independently of what is proved to be the law of the island, the courts of this country apply to *West India* mortgages the same principles which regulate the affairs of this country: I also take it to be clear that a mortgagee cannot covenant for a collateral advantage, and there can be no pretence for saying that this is a trust-deed, as contra-distinguished from a mortgage. Not that such conduct in a mortgagee is in itself illegal, but it is the rule of this Court, upon principles of policy not to allow it. There is nothing illegal in saying that the interest of a sum of money lent, if not paid within a year, shall be added to the principal, but the Court will not allow it. It is not usury, for usury consists in taking more for the use of money than is allowed by law; but it partakes in its effects of the nature of usury. It tends to usury, and therefore the Court will not permit it. So a mortgagee cannot have any profit by way of commission for receiving the produce of the estate. He may employ a third person to be the receiver, and he will be entitled to commission at the expence of the mortgagor; but it has been long since settled in this Court that a mortgagee shall not be entitled to the commission of a receiver. It makes little difference to the mortgagor whe-

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ther *A.* or *B.* be the person entitled to commission, but the Court has said it has a tendency to oppression, and no contract shall give to the mortgagee this collateral advantage. I take it to be quite clear, that a mortgagee may act as a trustee, and do a variety of acts for the benefit of the estate, and yet he shall not derive any advantage to himself from his so acting. He can charge nothing to the estate beyond what he really pays. A mortgagee or trustee, taking possession under this kind of authority, must act for the trust as if he acted for himself; and if *Goldwin* could have procured a merchant in *London* to transact the business for half commission, it would have been quite impossible for him to have put the other half in his pocket.

"It has been said that the act of assembly does not apply to cases where the commission is claimed by contract: And it is also said, that *Goldwin* was not a mortgagee but a trustee, and that there is nothing wrong in his claiming under a contract. As to the point, whether he is entitled to commission while resident in the island, I have some difficulty in declaring my opinion at present, for in a case of this nature, which is very important as between mortgagors and mortgagees of estates in the *West Indies*, I will not prejudice the question in a given period of the cause, before I have received all the information which I wish to have. But it does appear to me that I am called upon to declare an opinion upon the question which is put in issue; whether *Goldwin*, after he left the island of *Jamaica*, is entitled to commission? The opinion I have formed may be wrong, but I have not formed it without a great deal of attention; and I am clearly of opinion, that neither according to the law, and, (what is safer for me to say), nor according to the true intent and meaning of this contract can he have the benefit of this commission. It would be strange to say that he should, for it is to his personal care and attention that the reward is applicable, and those are not given. The principle upon which the Court determines these cases is, that if you bring yourself within a principle equitably to claim commission, that you shall be

allowed it, but that you have no right to it in virtue of any title under a deed as agent, trustee, or the like, unless you act under it.

" Upon these grounds, I think, considering the nature of the case, the form of the bill, and the transactions between the mortgagor and mortgagee, that the decree ought to have been confined to errors in the accounts of *Goldwin*, but without prejudice to any demand which the *plaintiffs* may have in a suit against *Foulkes*. Without giving any opinion upon the points, whether *Goldwin* as mortgagee or trustee while in the island, was entitled to commission, I think the declaration in the decree ought to be confined to the errors stated in the bill, and I think that commission is one of those errors. I am of opinion that *Goldwin* has no right to commission while in *England*, without prejudice to the other question while in the *West Indies*. Not that I have saved myself the trouble of forming an opinion upon the latter point, but as it involves the property of many persons, and that more light may be cast upon the question, and as the pleadings do not put that point in issue, I think I am running less risk of doing wrong by leaving it to the party to discuss it before the master, and making out his case there, than by deciding that present. With respect to the accounts since the death of *Ratcliffe*, I do not concur in the observations which impute blame to *Goldwin*, but I cannot hold these accounts not to be open to full investigation in the Master's office.

" The consequence will be that I shall vary the decree, altering it as I have stated, but as it relates to *Foulkes* without prejudice as against him, and leaving the party to make out their case on the point of commission, while *Goldwin* was in *Jamaica*, in the Master's office: As to that part which relates to the executor's accounts, the decree must be confirmed."

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PLASKET versus BEEBY.

IN THE COURT OF KING's BENCH,

IN HILARY TERM.

[Continued from p. 213.]

PLASKET *versus* BEEBY, *and Others.*

An infant devisee being sued on a bond of the testator, cannot claim the privilege that the parol *shall demur till such devisee come of age.*

That privilege is a relict of the feudal institutions, and not being extended to the devisee expressly by 3 & 4 W. and M. c. 14. is not to be extended by implication; for, with the abolition of the old tenures, the reason for it is gone, and the object of the statute was not to benefit the devisee but to relieve specialty creditors.

DECLARATION.—*Thomas Plasket,* executor of the last will and testament of *Thomas Plasket,* deceased, complains of *Hugh Beeby* and *Mary* his wife, *Sarah Thompson, W. Sarah Beeby,* and *Joseph Cowx* and *Ann* his wife: which said *Mary* and *Ann* are the daughters and co-heiresses at law of one *Joseph Thompson,* of certain lands, tenements, and hereditaments, whereof the said *Joseph Thompson,* at the time of his decease, was seised in fee simple, being in the custody, &c. of a plea that they render to the said *Thomas Plasket,* as executor as aforesaid, 300l. which they unjustly detain from him, &c. "For that whereas the said *J. Thompson,* deceased, in his life-time, and also in the life-time of the said *Thomas Plasket,* deceased, and after the 25th day of *March,* 1692, to wit, on the 10th day of *April,* 1781, at *C.* in the county of *C.* by his certain writing, obligatory, &c. acknowledged himself to be held and firmly bound to the said *Thomas Plasket,* deceased, in 300l. of, &c. to be paid to the said *T. P.* deceased, or his executors, when, &c. for the payment whereof, he the said *J. T.* bound himself and his heirs, executors, and administrators, firmly by the said writing obligatory; yet the said *Joseph Thomp-*

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son, deceased, in his life, and the said defendants, since the death of the said *Joseph Thompson*, have not, nor have any or either of them (although often required) paid to the said *Thomas Plasket*, in his life-time, or since his decease, to the said *Thomas Plasket*, as executor as aforesaid, or to either of them, the said sum of money above mentioned, or any part thereof, but, &c. &c.

Demurrer of the parol: And the said *Hugh* and *Mary*, *Sarah Thompson*, *Joseph* and *Ann*, by *Thomas Benson*, their attorney, and the said *Mary Beeby* by *Thomas Beeby*, who is admitted by the court of our said Lord the King, here, to defend for the same *Sarah Beeby*, she being within age, as guardian of the said *Sarah Beeby*, come and defend the wrong and injury, when, &c. and say that the same *Sarah Beeby* is within the age of twenty-one years, namely, of the age of eighteen years and eight months, and no more, to wit, at *C.* aforesaid, and this they are ready to verify; wherefore they do not suppose that during her minority she ought to answer the said *Thomas Plasket* in his said plea, &c. and they pray that the said *parol* may demur until the full age of her the said *Sarah Beeby*, &c.

Demurrer by the *plaintiff*: And the said *Thomas Plasket*, executor as aforesaid, says, that by reason of any thing by them the said *Hugh* and *Mary*, *Sarah Thompson*, *Sarah Beeby*, *Joseph* and *Ann* above, in pleading, alleged the said *parol* ought not to demur, nor to be delayed until the full age of the said *Sarah Beeby*; because the said *Thomas Plasket*, executor as aforesaid, says, that the said plea of them the said *Hugh* and *Mary*, *Sarah Thompson*, *Sarah Beeby*, *Joseph* and *Ann*, in manner and form aforesaid, above pleaded, and the matters therein contained, are not sufficient in law to preclude them from answering the said *Thomas Plasket*, executor as aforesaid, in his said plea, nor that the said *parol* should demur till the full age of the said *Sarah Beeby*; to which said plea and the matters therein contained, in manner the same are above pleaded, he the said *Thomas Plasket*, exe-

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cutor as aforesaid, is under no necessity, nor is he bound by the law of the land to answer, and this he the said *Thomas Plasket*, executor as aforesaid, is ready to verify; wherefore, for want of a sufficient plea in this behalf, the said *Thomas Plasket*, executor as aforesaid, prays judgment, and that the said parol may not demur till the full age of the said *Sarah Beeby*, and that the said *Hugh* and *Mary, Sarah Thompson, Sarah Beeby, Joseph* and *Ann*, may answer to his said plea and suit, &c.

To this there was a joinder in demurrer by the defendants.

And two questions were made upon these proceedings, which were stated in the paper book, according to the late rule of the court, as follows, viz. *First*, Whether an infant devisee, being sued upon the bond of his testator, can claim the privilege, that the *parol* shall demur till such devisee shall come of age? *Secondly*, Whether such a privilege can be claimed by more *defendants* than the infant?

WALKER *for the plaintiff*. "The first question is upon the statute of the 4 *W. & M. c.* 14.* The object of this statute as expressed in the preamble, is to counteract the practice which had then prevailed, 'that persons who had bound themselves and their heirs, and who had afterwards died seised in fee-simple of lands, &c. had, to the defrauding of their creditors, by their last wills devised the same in such manner as such creditors have lost their said debts.' 'For remedying of which, and for the maintenance of just and upright dealing,' that statute was enacted: and it made such lands chargeable in the hands of the devisee in like manner as if they had passed to him by descent. This is a remedial statute, and therefore is to be construed liberally to further the object for which it is made. That object is to create a responsibility in the devisee to which he would have been no otherwise liable, but in no part of it does there appear any intention to favour the devisee. It only permits him to take the estate under the devise, subject to the performance

* Continued and made perpetual by 6 and 7 *W.* 3. c. 14.

of certain duties; and to give to an *infant* devisee the privilege which is now claimed would be, in a great measure, to defeat the object of the statute. The debts, by the accumulation of interest, may even be so increased during the minority of the infant devisee, that when he came of age the estate would not be sufficient for the payment, and yet he would have enjoyed the profits of the estate in the interval. There is also a difference between the case of the heir and the devisee; the former is bound originally in the bond, and is a sort of party to it; the devisee is bound by taking the estate. And with respect to this question, it must be observed, he takes that estate by a sort of grant; and if an infant be in by purchase he shall not have *his age* for the parol to demur *; nor where he is an occupant only. As 'Although if lands in fee *descend* on an infant the *parol* shall demur in equity as well as law; yet where a lease is made to a man and his *heirs* for three lives, the heir does not take by descent but as a special occupant, and the *parol* shall not demur. *Chaplin* v. *Chaplin*. † It is therefore plain that this privilege is only consequent upon the lands passing by descent. And the acts, 3 *Ed.* I. c. 46.—6 *Ed.* I. c. 2.—13 *Ed.* I. c. 40.—52 *Henry* III. c. 60. shew that it is the object of the legislature rather to restrain this privilege than to extend it: and the 3 *W. & M.* should be construed upon the same principle. But admitting, for the sake of argument, that the devisee would be entitled to plead her non-age, she should have done it alone, and not have joined with the heirs and other devisees, who are of age, and who therefore are not entitled to this dilatory plea. *Aston, p.* 241. *Bro. Red. pl.* 35."

RICHARDSON, *contrà*. "By the statute the *devisee* is placed in precisely the same situation in which the heir stood, at common law. Now, the infant heir might demur in respect of his *non-age*, and it is equally clear, that the other heirs, though of age, would be entitled to

* *Waller* v. *Lambe, Dyer*, 321. *b. Co. Litt.* 239.

† 3 *Peere Wms.* 368.

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partake of the benefit of that privilege in respect of their making contribution, which ought to be equal from all the heirs. *Comyns*, title *Pleader*, 2 *E.* 3. 'In debt against the *heirs* in *gavel-kind*, if one be within age,' the *parol* shall demur,* "Or, against parceners,' *ibid* ;† 'And at the full age of the infant there shall be a *resummons* against all the co-heirs,'‡. In *Co. Lit.* 290. *a.* it is also said, 'If a man have a judgment, or be bound in a recognizance, and die, leaving two daughters, and one be not of age, no execution shall be sued.' Then the next object to be considered is, Whether the devisee is entitled to the privilege equally and in the same manner as the heir. Now the design of the 3 *W.* & *M.* c. 14. is to put devisees precisely upon the same footing. In the third *section* an action is given to the creditors, in the cases recited in the preamble, against 'the heir and heirs at law of such obligors and such devisee and devisees *jointly*;' and 'such devisees shall be liable and chargeable for a false plea by him, and them pleaded in the same manner as any *heir* should have been for any false plea by him pleaded; or, for not confessing the lands to him descended.' In the 5th *section* the heir is made answerable *de bonis propriis*, for lands aliened by him before action brought. And in the seventh *section*, it is declared, that all devisees made liable by the act shall be liable and chargeable 'in the same manner as the heir at law.' So that either taking the general purview of the statute, or its particular clauses separately considered, it seems that the devisee, who is to be made liable as the heir, shall be also entitled to the same privilege. This in principle was the ground of the decision, in *Matthews* v. *Jones and others*, ‖ where it was held, that the *alience* of a devisee was equally discharged of the debt of the testator

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* *Ast. Ent.* 241. *Bro. Red.* 195. † 3 *Co.* 13. *a.*

‡ *Comyns*, *ibid.* *Bro. Red.* 196. See also Sir *John Langford's* case, cited in *Herbert's* case, 3 *Co.* 13. *a.* Also, *Lib. Ass. anno* 29. And *Bro. Abr. Parol. demur.* pl. 16, &c.

‖ *Anstruther*, 506. See also *Gott* v. *Atkinson*, *Willes*, 524.

as the alienee of the heir, if the alienation were before the suit commenced."

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WALKER, *in reply*. "If a plea be pleaded by several defendants, which is good only as to one of them, it is a defect in substance and not form, and may be taken advantage of upon general demurrer. The case in *Lib. Ass. anno* 29. pl. 37. which was cited to shew that all the defendants might join in this *plea*, as several *heirs* might at common law, is founded upon the principle that all the defendants there were equally liable, and were to contribute equally; but in this case the statute imposes a greater liability upon the devisee than the common law does upon the heir; and by the second *section* it appears, that the devisees, as against the creditors, have no estate at all until all the debts are paid. Indeed, the statute in many respects makes the situation of the heir and the devisee very different."

Lord ELLENBOROUGH, C. J. "In every view of this case it appears to me to turn entirely upon the statute. For before that act was passed the *devisee* was not liable at all upon the bond of the testator. He is now liable by the statute, and to the full extent of it, and no further. The privilege of the heir to demur during *non-age* is an anomalous one, and peculiar to the heir alone. It is unnecessary on the present occasion to travel far into the history of that privilege; but if it were examined it would probably be found to be immediately connected with our *feudal* institutions. Persons who were heirs in *chivalry* enjoyed the privilege on account of the deficiency of the funds to maintain them during infancy, because the general funds went to the guardian in chivalry. This seems to have been its first origin, though it was afterwards extended to *all heirs*. But with respect to the devisee under the statute, he is charged with the debts by the terms of it; and as the privilege of demurring during *non-age* is not given to him expressly by the statute, he cannot claim it by implication; considering that it is an anomaly in the law for the exclusive benefit

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of the heir. There must be judgment for the *plaintiff*, the plea being ill pleaded."

GROSE, J. "I have attended to the observations which have been made upon the separate clauses of this statute, particularly the second *section*, and also upon the general *purview* of it, in order to discover if there be any exception from the general liability imposed upon the devisee. The plain meaning of the statute was that creditors should not be defrauded of their just debts, and if any exception had been intended to be grafted upon it, we are to presume that the legislature would have clearly expressed its design in that respect. But as it does not contain this exception expressly, I concur in the opinion, that it cannot be claimed by the *devisee*."

LAWRENCE, J. After making some observations upon the several clauses of the statute, referred to the following passage in Lord C. Baron *Gilbert*'s History of the Common Pleas, as explanatory of the nature and foundation of the plea by the heir, viz. "The parol's demurring "until the full age of the infant, is a dilatory plea or "temporary bar, and peculiar only to the *feudal* law; "for in the civil law the guardian was party to the suit in- "stead of the infant; and if there was *mala fides* in his "defence he was to answer it to the infant; but the ward- "ship in the feudal law was of another nature, for the "guardian has the whole profits of the estate, and also the "marriage of the infant, which was to breed him up to "the army, and to marry him to such person as he thought "might continue the *martial strain*, that so the ward "might subserve the original design of the tenure.*

"Hence it was that the guardian was not trusted with "the action, and by consequence it was a maxim amongst "them that the infant could not be party to the writ.

"But this maxim was confined to such cases where the "right of the *feud* was in demand, and was not allowed to

* See also *Bacon's Abridgment*, *Infancy*, and *Age*. (L) 1, vol. 3, p. 621; which cites 3 *Bulst.* 143. *Roll's Rep.* 325.

"actions touching the possession, and the reason was "from necessity. For if the infant was not allowed to "defend his possession, an infant would be stripped of all "he had during his minority. And so of injuries done by an "infant, the parol shall not demur, because then a general "licence would be given for infants to commit injuries; "and therefore the prosecution of those actions was com- "mitted to the next friend, and the defence of the actions "against an infant to a special guardian assigned by the "court; and afterwards Lord C. B. *Gilbert*, adds, "*But in all cases on the fee, as if an action of debt on "the obligation of the ancestor be brought against the "heir, there the parol shall demur, because that lays a "burthen on the fee, which by the law was to be preserved "entire till the infant came of age, since the profit was "given away during his non-age to the lord.*"* He then added, "If this be a correct explanation, it will appear a little singular how the privilege should have been extended to lands held in sockage, but although it has been so extended, that circumstance affords no reason for carrying it further as to devisees. It appears to me, therefore, that in this case, there is no ground for this dilatory plea, since no foundation is afforded for it by the *terms* of the statute."

LE BLANC, J. "The nature of the plea is quite sufficient to induce the Court not to extend it unless it be a necessary and unavoidable inference from the terms of the act. If an heir take land by purchase, he shall not be entitled to the privilege; it is merely confined to the heir taking land by descent; and here it rests upon the statute of 3 *W. & M.* c. 14. which was evidently intended to prevent fraudulent devises; and were the statute to give the dilatory plea in other cases, such as those contended for, instead of promoting, it would defeat its immediate object. The intention of parliament was to give every convenient relief to creditors against the devisee. It appears to me then, that the plea is bad."

JUDGMENT FOR THE PLAINTIFF.

* See also *Bacon's Abridgment*, *ut supra*, which cites 2 *Inst.* 89. *Moor*, 74. *Dyer*, 239, pl. 39. *And.* 10.

HALL *versus* CAZENOVE.—*Friday, February* 3.

A charter-party, purporting to be indented, made, *and* concluded, *the 6th day of* February, *whereby it is agreed that the ship shall proceed from* Deptford, *on a voyage to* Demarara, *on or before the 12th of the same month, and by which the owner covenants that she shall proceed on her intended voyage on the day before mentioned, is actually executed by both parties on a day subsequent, viz. the 15th of* March *following, while the ship is still lying in the river. The ship sails after the* 12th of February, *and performs her voyage. The owner brings an covenant for the freight, averring that the charter-party was in* dented, made, *and* concluded, *after the day of the date, and after the 12th of* February, *and averring performance of all which on his part was possible to be performed: Held, upon special demurrer, that the* plaintiff *was not estopped from alleging that the deed was* indented, made, *and* concluded, *after the day it bears date.* Concluded *implies* delivery *of the deed.*

Semble.—*The covenant that the ship should sail before the* 12th *is not a condition precedent, but rather an independent covenant.*

Held also, that if it be a condition precedent in terms, yet it having become impossible at the time of making the deed, within the knowledge of both parties, it is no part of the real contract between them, and the plaintiff *having performed the voyage, which is the substance of the contract, is entitled to his freight.*

HALL *versus* CAZENOVE.

THE *plaintiff declared* upon a charter-party "purporting to be *indented, made,* and *concluded,* on the 6th day of *February,* 1801, between the *plaintiff,* by his name and description of *J. Hall,* owner of the good ship called the *Argo,* then lying in the river *Thames,* &c. on a voyage, &c. to *Demarara,* on the one part, and the *defendant* and one *John Batard,* of the other part; *but which charter-party was, in fact, first* indented, made, *and* concluded, *after the 6th day of* February, *in that year, to wit, on the 15th day of* March, 1801, *and not on the said 6th day of* February, *or at any time before, or on*

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the said 12th day of February, *and was also in fact sealed and delivered by the said* plaintiff *and the said* defendant *only*, to wit, &c. And made *profert* of the same, bearing date the said 6th day of *February*, 1801. The declaration proceeded to state the covenants in the charter-party, in substance as follows:—

The *plaintiff* agreed that the ship *should and would proceed from* Deptford, *where she then lay, on or before the 12th day of the said month of* February, to the port of *rendezvous* for the outward bound convoy, and sail under convoy to *Demarara*, there to deliver her freight in ten days from her arrival, and return with a full cargo from the *defendant's* agents, under convoy to *London*, and make true delivery, &c. "And the said *owner* did thereby covenant that *the said ship should and would proceed on her intended voyage on the day before mentioned.*" The declaration then stated the terms of the loading and unloading at *Demarara* and at *London*: "*In consideration whereof and of every thing therein above mentioned*, the said *defendant did* thereby covenant, &c." stating the covenants for the payment of freight. The *plaintiff* then alleged "that the said ship did, after the making of the said charter-party, to wit, on the said 15th day of *March*, in the year aforesaid, proceed from *Deptford* aforesaid, in and upon the said voyage, in the said charter-party mentioned, under and upon the terms in the said charter-party specified;" stating all the necessary particulars of the sailing with convoy, loading and unloading the cargo, and the demurrage, the reporting at the *Custom House*, &c. that the freight, &c. amounted in the whole to 1880l. &c.; "And the said *plaintiff* further saith that two months from the time of making the said report at the *Custom House* has long since elapsed, *and although the said* plaintiff *hath done and performed, and been ready to perform every thing in the said charter-party contained on his part to be performed, and which on his part and behalf could possibly be performed*, according to the tenor and effect, true intent, and meaning of the said charter-party, &c.

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Yet the *defendant* did not, &c.;" and so assigned a breach in non-payment of the freight and demurrage."

There were other counts in debt for freight, primage, and pierage, and for the use and hire of the ship, and for demurrage, together with the common money counts.

The *defendant*, in his plea, set out the charter-party upon *oyer*, which purported to be *indented, made, concluded*, and *agreed upon* [this] 6th day of *February*, 1801, between the *plaintiff*, *defendant*, and *Batard*, and was in every respect the same as set out in the declaration, concluding "*In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.*" He then demurred specially to the first count of the declaration, stating for causes ;" for that it is not alleged, nor does it appear in or by the said first count of the said declaration, that the said ship in the said charter-party mentioned, did proceed from *Deptford* aforesaid, on or before the 12th day of *February*, in the said charter-party mentioned, to the port of *rendezvous* in the said charter-party mentioned. And it is alleged in and by the said first count of the said declaration, that the said charter-party was *first indented, made*, and *concluded*, after the 6th day of *February*, 1801; Whereas it appears, in and by the said charter-party, that the same was *indented, made*, and *concluded on the said 6th day of* February, in the year aforesaid, and the said *J. H. is by law estopped* from making the said allegation.

To the other counts the *defendant* pleaded the general issue.

GILES, *for the defendant*. "The *plaintiff* is *estopped* from making the averment contained in his declaration that the charter-party was first *indented*, &c. after the 6th and also after the 12th day of *February*, 1801, to wit, on the 15th of *March*. Now this is an allegation not merely relating to the time when the charter-party was indented but which avers, that it was *indented, made, concluded* &c. after the time on which, on the face of the instrument itself, it appears to have been *indented*, &c. This aver

ment is, therefore, contradictory to the deed, and according to *Goddard's* case*, and *Broke's Abridgment*, title *Obligation*, an averment inconsistent with the deed, is not good.

"A deed cannot be stated to be delivered *prior* to the date which it bears on the face of it. Though it may be competent to a party to state that a deed is *delivered* subsequent to the date, yet, here it is not stated when it was *sealed* or *delivered*, which is the essential thing with respect to a deed. But if it be admitted, that it is sufficiently to be collected from the declaration, that the deed was *delivered* on the 15th of *March*, still it remains under the terms of the charter-party a *condition precedent* to the *plaintiff's*, recovering the freight and demurrage, that the ship shall sail on or before the 12th of *February*. All the words in the *charter-party* are *prospective*, yet this *declaration* makes them have a retrospective operation. But the deed not being made till the 15th of *April*, the terms of the charter-party became impossible to be performed and this condition precedent on the part of the *plaintiff*, being impossible, and consequently not having been performed according to the deed, the stipulations on the part of the *defendant* are void, and cannot be enforced. *Coke Littleton*, 206. *a.*

Lord ELLENBOROUGH, C. J. *(stopping the Counsel on the other side.)* "The condition, on which much has been said, is not impossible, if it be a condition precedent, but as the case now stands, it is a violation of all language, and all rules of law to call it so. This is a *sham plea*, which has caused much consumption of time. The first objection is, that the *plaintiff* is *estopped* from his allegation, as to the time of the making of the *charter-party*. This charter-party is dated on the 6th of *February*, and therefore it is said that the averment that it was actually *indented, made, concluded*, &c. on the 15th *April*,

* 2 *Coke's* Rep. 4. *b.*

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is contradictory to the deed. But the material word in this allegation is only the word *concluded*, for the charter-party is *concluded* only when the deed is *delivered*; and from *Stone* v. *Ball*, 3 *Lev.* 348, it is clear that a deed may be averred to be *delivered* after it bears date. Then the *estoppel* is no longer a difficulty. As to the second objection, that the ship did not sail on the 12th of *February*; if that time had not elapsed when the deed was *delivered*, it would have been a condition precedent; but upon that question it is not necessary to decide now, for it is obvious, that the time having passed, it was a condition impossible at the time of making the charter-party. Now, the parties contracting must be presumed to know, whether the vessel had or had not sailed, and therefore the time having gone by, it would be a monstrous absurdity to consider that condition with respect to the time of the sailing, which was then impossible, as being really any part of the contract. The rest of the contract, however, which relates to the destiny of the vessel, the voyage, the loading, the payment of the freight, and all the subsequent particulars, may take effect."

GROSE, J. Of the same opinion.

LAWRENCE, J. "I am of the same opinion. I doubt whether this be a condition precedent. The case of *Constable* v. *Coberry*, in *Palmer*, 397, is somewhat similar. '*A*. the master of a ship covenanted with *B*. a merchant, to go with his freight the *first fair wind*, and *B*. covenanted to pay so much for the freight. *A*. brought action of covenant, and alleged that he had performed the voyage. The *defendant traversed that he did not go with the first fair wind*. And upon demurrer it was held, that the traverse was not good; for it is only a *circumstance*, and nothing is traversable but what is material.' All that was considered necessary there was, that the ship should go to the place to which she was destined; so here all that seems material is that the ship should go to *Demarara*, and take the freight. On this point the case of *Boone* v.

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Eyre * also seems material. In that case *A.* by deed conveyed to *B.* the equity of redemption of a plantation in the *West Indies*, together with the stock of negroes on it, in consideration of 500l. and an annuity of 160l. for life, and covenanted that he had a good title, and was lawfully possessed of the negroes, and that *B.* should quietly enjoy. And *B.* covenanted that *A.* well and truly performing all things therein contained on his part he would pay the annuity. In an action of covenant by *A.* the breach assigned was the non-payment of the annuity: plea that *A.* was not *legally possessed of the negroes*, and so had no good title to convey; and that plea was held ill on demurrer. For the Court held that it was an *independent* covenant, which went only to *part* of the consideration; and as the breach of such a covenant might be recompensed in damages, an action may be maintained on it without averring the performance of the whole; for it would be unreasonable that *B.* should keep the plantation, and yet refuse payment. Therefore, also in the present case, this may not be a *condition precedent*. The reason of it, as well as the law, would lead us to support the present contract; for if the voyage is performed, and great profit is to be derived from its performance, it would be hard indeed if the *defendant* were not to make any compensation for the fulfilment of all the important parts of the contract."

LE BLANC J. expressed himself shortly of the same opinion.

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* *II. Blackstone*, note *a.* p. 273.

1804. CHEETHAM *versus* WILLIAMSON, and Others.—*Feb.* 3.

A mortgagor, and mortgagee of manors &c. in fee, convey the same and all the estate, &c. by lease and release, to a purchaser: in the conveyance is contained a covenant from the purchaser, that the mortgagor, his heirs and assigns, may enter and dig for coal, and other mineral, and take the same to their own use: Held, that this is only a liberty, and the heirs of the mortgagor cannot bring trover against the tenants of the land for coal dug there, under a lease of the coals from the owner of the soil. Also, that it is not a reservation *or* exception *by the mortgagor, out of his estate, for at the time of making the conveyance, he had only the* equity of redemption, *and no legal estate out of which to make such reservation.*

CHEETHAM *versus* WILLIAMSON and Others.

THIS was an action of *trover* for coals, in which the jury found, upon a special verdict, that one *R. Nettleton*, was seised in fee, subject to an equity of redemption in one *Edward Hyde*, of certain lands and tenements in *Haughton*, in the parish of *Manchester*, in the county of *Lancaster*. By lease and release of 28th and 29th *March*, 6 *W. & M.* the premises were conveyed by *Nettleton* and *Hyde* to one *Hobson*, in fee, who covenanted and granted thereout a rent-charge to *Hyde* and his heirs, and further covenanted "that it should be lawful for "*Hyde* and his heirs at all times to enter into all or any "part of the premises to search and dig for coal or stone, "or any other mineral whatsoever, and the same to take, "have, and carry away to their own use;" with a proviso, "however for *Hobson* or his heirs to deduct part or the whole of the rent-charge, as should be reasonable to compensate for the damage done thereby to the premises. *Hobson* also covenanted to permit *Hyde* and his heirs to *hunt* on the land for game. Under this conveyance *Hobson* became seised in fee, and *Hyde* being seised of other lands in fee, conveyed to other persons, *Hobson* joining in the conveyance, with the same reservations, &c. On *January* 1, 1777, the estate thus conveyed to *Hobson*, and the other estates, became, and now are vested in one *George Hyde Clarke*, tenant for life, *sans waste*.

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On the 1st of *January*, 1781, all the estate, power, &c. of *E. Hyde*, by the exception in the above conveyance, became and now are vested in the *plaintiff*, in fee, as amply as they were held by *Hyde*, who is also entitled to the rights reserved out of the other estates in fee. That for upwards of, and within, sixty years the persons claiming under *Edward Hyde*, by virtue of the above *exception*, and their lessees, have got coals under the lands, and made allowances for the injury done to the lands. That by an agreement, dated 4th of *November*, 1782, between the *plaintiff* and one *Fletcher* the agent of *G. H. Clarke*, for the management of his collieries worked by a water engine, *Clarke* being then resident in *Jamaica*, it was agreed, *inter alia* by the *plaintiff*, to set his coals in *Haughton*, that lie above the level of or can be laid dry by Mr. *Clarke*'s present water engine, in *Haughton*, to Mr. *Clarke*, of *Hyde*, except so much of his coal as is in a meadow in *Haughton*, called *Jasper Meadow*, in the occupation of *S. Hague*, which Mr. *Cheetham* agreed to set to Mr. *Arden*, of *Stockport*, together with the liberty of sinking pits for the getting and vending the same. The special verdict then set out the residue of the agreement, and "that such part of the coals mentioned in the indentures of the 28th and 29th of *March*, 6 *W.* and *M.* as lie above the level, in the agreement mentioned, are part of the coals comprized in the above agreement. That *G. H. Clarke* assented to the agreement, and got the coals under it according to the terms of it; part of which was that he should pay one penny for every horse-load of coal so gotten and sold. That *G. H. Clarke*, on the 22d *December*, 1798 demised to the *defendants* the coal mines mentioned in the agreement, together with his other coal mines in *Haughton*, as tenants from year to year; and they entered and were possessed thereof. That the *defendants* got the *coals in question* under the premises mentioned in the indentures of the 28th and 29th *March*, 6 *W.* and *M.*; that they were gotten *under* a level of the water engine of *G. H. Clarke*, mentioned in the agreement, and that no part of the said coals were com-

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prised in the said agreement. That notice was given by the *plaintiff* to the said *defendants* not to get the coals so situated, and that the *defendants*, after such notices, got and converted the same to their own use.

LITTLEDALE, *for the plaintiff*, cited *Shepherd's Touchstone*, 77. *Co. Lit.* 47, *a. Drake* v. *Munday*, *Cro. Car.* 207. *Co. Lit.* 143, and *Dyer*, 276, and argued that the covenant by *Hobson*, in the indentures of 28th and 29th of *March*, to permit *Hyde* and his heirs to enter and get coal, was a reservation and exception out of the estate conveyed by *Hyde*, and gave him and his heirs an exclusive right to the coals, and not a right merely concurrent with *Hobson* and his heirs. For this purpose also he cited Lord *Mountjoy*'s case.*

Lord ELLENBOROUGH, C. J. *stopping* WOOD *on the other side.* "This case appears to me to involve no point of difficulty. In contemplation of law *Edward Hyde* was a perfect stranger, as to any legal estate, and therefore could neither *grant* the *legal* estate, nor consequently *reserve* to himself any thing out of it. He possessed only the *equity of redemption*, and could convey only that which he possessed. The case of Lord *Mountjoy*, in *Anderson*, is a decisive authority against the *plaintiff* in the second resolution: nor is there a single case in the law to shew that where a man has the liberty of getting coals he is considered as having an absolute property in the soil, so as to maintain an action of trover. The decision of the twelve Judges in Lord *Mountjoy*'s case is decisive of the negative of that question. Here *Nettleton* only is seised in fee; he conveyed to *Hodgson;* and *Hyde* only confirmed the estate by conveying to him the equity of redemption. How it might have been if there were a livery of seisin, or a feoffment by *Hyde*, and he had passed the legal estate, it is not necessary now to decide. But

* *Anderson*, 307. *Moor*, 174. *Godb.* 17. 4 *Leon.* 147.

that makes the distinction between this and Lord *Mountjoy's* case; for he was seised of the legal estate, and *reserved* out of that estate a liberty to himself to dig and carry away the *allum*. Here the *plaintiff* has not an exclusive right to the whole, but only a liberty.

JUDGMENT FOR THE DEFENDANTS.

PARSLOE *versus* DEARLOVE.—*Jan.* 26.

A schoolmaster takes the son of B. *to board for half a year, ending the 24th of* June; *the son is taken home for the holidays on the 18th*; B. *becomes bankrupt on the 20th: Held, the half year's board is not a debt proveable under the commission against* B. *and therefore not barred by his certificate.*

Semble. *The statutes,* 7 Geo. I. *c.* 31, *and* 5 Geo. II. *c.* 30, *apply only to the written* securities *therein mentioned, and debts secured thereby.*

ACTION of Assumpsit by a schoolmaster for board, &c. for the *defendant's* child; the *defendant* pleaded his bankruptcy and certificate. The facts proved on the trial were, that the *plaintiff* was to be paid *half-yearly*, the half year ending the 24th of *June*. The *plaintiff* took his child away from school before that time, viz. on the 18th, and became a bankrupt on the 20th; and the question was, whether this was a debt proveable under the commission.—Lord ELLENBOROUGH, C. J. who tried the cause, thought that it was not, and a verdict was found for the *plaintiff*.

ESPINASSE now moved for a new trial, contending that under the statutes 7 *Geo.* I. c. 31, s. 1, and 5 *Geo.* II. c. 30, this being a debt certain, and payable at a certain day, might be proved under the commission. That the contract was entire for the half year, and that upon the taking away the child, the master having done all on his part up to that time, and being prevented by the

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father's own act from doing more, might immediately have brought an action for the whole. He stated that the 18th of *June* was the day when the school broke up for the holidays. He also cited *Cochrane* v. *Love*,* and *Henbest* v. *Brown*, † to shew that the statute extended to all *debts*, which are *debita in presenti solvenda in futuro*

Lord ELLENBOROUGH, C. J. "At the trial, when this point was made, I looked into the statutes, and found the word *securities* running through the whole of them. I therefore over-ruled the *defendant*'s Counsel, because I thought they applied only to debts founded on the written securities therein mentioned. The case cited from *Peake's Nisi Prius*, is stated only as the *inclination* of the opinion of Lord *Kenyon*. This was a subsisting contract at the time of the bankruptcy, and not proveable under the commission.

THE RULE NISI REFUSED.

COOPER *versus* HUNCHIN, *otherwise* HUNCHEON.—*Thursday, February 7th.*

Interlocutory judgment being obtained in assumpsit against a feme sole, *final judgment may be entered, and a* ca. sa. *may issue against her a a* feme sole, *although she marry before the suing out of the* ca. sa.

COOPER *versus* HUNCHIN.

ON a rule to set aside the *ca. sa.* issued in this cause and upon which the *defendant* was taken into custody for *irregularity*, with costs; the *defendant* swore that since the interlocutory judgment in assumpsit for goods sold and delivered, she had *intermarried* with one *Robert Ridgway*, of which the *plaintiff* and his *attorney* had notice.

ESPINASSE shewed cause, relying upon 3 *Blackstone* Commentaries, 414, and *Doyley* v. *White*, *Cro. Jac.* 32

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* *Cooke*'s Bankrupt Laws, 18. 23. † *Peake's Nisi Prius* Ca.

to shew that "If an action be brought against an husband and wife for the debt of the wife when sole, and the *plaintiff* recovers judgment, the *capias* shall issue to take both the *husband* and *wife* in execution; but if the action was originally brought against herself when sole, and pending the suit she marries, the *capias* shall be awarded against *her only*, and not against her husband."

BARRY, in support of the rule, endeavoured to distinguish this case from *Doyley* v. *White*, which, he said, was a case of trespass. And he cited also *Salkeld*, 117, and *Shower*, 91. "If a woman gives a warrant of attorney and marries, the judgment may be entered up against both."

Lord ELLENBOROUGH, C. J. "That being upon a warrant of attorney, the suit itself may be considered as commenced when the judgment is entered up."

BARRY then cited *Barnes'* Notes, 167—*Rownson and Wife* v. *Williamson*; and 3 *P. Wms.* 409—*Heard and Wife* v. *Saunders*; and upon being questioned by the Court as to what step the *plaintiff* should have taken, contended, that he should have sued out a *scire facias* against the *husband* and *wife*.

Lord ELLENBOROUGH, C. J. "In this case as the execution follows the nature of the *judgment*, which is against the *defendant*, as a feme sole, the *plaintiff* could only have the execution against her. Whether the *defendant* can bring a writ of error, *coram nobis*, is another question. He does not want a *scire facias* to charge any other person than the *defendant*. He has a right to take the body of the *defendant* if he does not wish to proceed against the husband.

LAWRENCE, J. "According to the general rules of pleading there is no necessity for a *sci. fa.* unless there is some alteration in the parties to the record, and it is sued

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out in order to charge them, or another person, in that new situation."

RULE DISCHARGED.

In the Matter of Sir EDWARD PRICE, *Bart.*—*Feb.* 11.

Habeas Corpus *granted to bring up a prisoner, confined for non-payment of a fine to the King, and also for debt, in order to give evidence before a committee of the* House of Commons, *he being summoned for that purpose by the* Speaker's *warrant.*

The rule in such case must be served on the person who would be liable for an escape, and also on the persons who might proceed against him in case of an escape.

In re Sir EDWARD PRICE, Bart.

WETHERELL moved for an *Habeas Corpus*, directed to the keeper of the gaol of *Ilchester*, to bring up Sir *Edward Price*, Bart. in order to be a witness upon a petition to parliament concerning the last *Ilchester* election, which was then pending before a committee of the House of Commons, and on which the *Speaker* had issued his warrant for his attendance. This, it was suggested, was not a sufficient authority for the *gaoler*, and he might be liable to an action for an escape. The present application, therefore, was made for his security; and WETHERELL mentioned that in the last *Coventry* election case, an application was made to a Judge, at Chambers, to bring up one *Bryant*, a prisoner in the *King's Bench*, he having refused to come upon the *Speaker's* warrant: and that, in a case of contempt before the *House of Lords*, it had been also necessary to resort to this process.

LAWRENCE, J. observed that there was a late act of parliament, 43 *Geo.* III. c. 141,* which *specially* authorized the Court to issue writs of *Habeas Corpus* to

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* *Vide* LAW JOURNAL *Acts of Parliament*, vol. iii. p. 3.

bring witnesses before courts martial, &c. and there was some doubt about granting the rule; but at length a rule *Nisi* was granted, which

In re Sir EDWARD PRICE, Bart.

THE COURT said should be served upon the *Attorney-General*, and also upon the person who would be liable in case of an escape, and that notice should be given to all persons who had lodged detainers for debt against the prisoner, he being originally confined for not paying a *fine* due to the *King*.

Afterwards, upon an affidavit of the service of notice on Sir *Edward Price*, the gaoler, the solicitor for the treasury, and one *Robert Roberts*, the agent and attorney of *Thomas King*, the only person at whose suit he was then in execution, he being supersedable in other actions;

THE COURT made the rule absolute, and ordered that *Webb*, the *petitioner* before the *House of Commons*, should pay all the expences of bringing him up, &c.

LEWIN *versus* SMITH.

Affidavit *of debt against* two *defendants for a joint and* separate *debt*; latitat *against both*; declaration *against* one *only: Held irregular, and the declaration and subsequent proceedings set aside.*

THE *plaintiff* made an affidavit of debt against the *defendant* and another, on their *joint* and *separate* promissory note, stating them *jointly* and *separately* indebted. He then sued out one latitat with an *ac etiam* against them jointly, but arrested only the *defendant*, *Smith*, and afterwards declared against him separately.

LEWIN *versus* SMITH.

BEST moved to set aside the *proceedings* for irregularity with costs, and cited *Holland* v. *Johnson*,* and *Gilbey*

* 4 Term Rep. 695.

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v. *Lockyer.** He therefore relied upon the affidavit, and the *ac etiam*, as shewing an intention to proceed against both, and said that it would be the means of committing fraud upon the revenue, for if this one *defendant* could be proceeded against *separately* on this affidavit, so might the other also.

GASELEE, on the other side, said, that there was no case to shew that the proceedings are irregular when there is one affidavit, but the cause of action being the same against both parties, the *plaintiff*, in mercy, drops the proceedings against *one* of them. But

THE COURT thought this case decided by the former, and made the rule absolute to set aside the *declaration*, and the subsequent proceedings; but they would not give costs, because the rule prayed too much: namely, that the writ should be set aside also, which was regular.

RULE ABSOLUTE, PRO TANTO.

The KING *versus* the SHERIFF of MIDDLESEX. PEARSON *versus* PUGH.

Where a writ is delivered to the late *sheriff, and executed by him, and the* return *to the writ happens in the time of a* new *sheriff, the* new *sheriff must return it with the* late *sheriff's return indorsed thereon, in order to the Court's, proceeding to enforce obedience to the writ; but if the* new *sheriff return* cepi corpus *by mistake, and an attachment afterwards issue against the* late *sheriff for not bringing in the body, this is irregular, as the Court can only look to him who made the return. But where the rule to bring in the body was had the* 12*th of* November, *and no objection made to the attachment till the* 27*th of* January *following, it was held that the party came too late.*

THE KING versus The Sheriff of MIDDLESEX.

RULE to set aside an attachment, &c. issued against the *late* sheriff of *Middlesex*, for not bringing in the

* *Doug.* 207.

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body of the *defendant*, for irregularity. The late sheriff had arrested the *defendant*, and he going out of office before the return of the writ, the *present* sheriff returned *cepi corpus*, the late sheriff having been ruled for that purpose: and upon the *late* sheriff being ruled to bring in the body, and failing, an attachment issued against him.

HULLOCK, in support of the present rule, contended, that it was irregular, for the Court could only look to the sheriff in whose time the return to the writ happened; and for this purpose cited the rule of court, *Trinity*, 31 Geo. III. whereby it is ordered that where any sheriff, before his going out of office shall arrest any *defendant*, and a *cepi corpus* shall afterwards be returned, he shall and may be called upon within the time allowed by law to bring in the body, notwithstanding he may be out of office before such rule shall be granted." Yet he contended that this did not apply to a writ returnable after the late sheriff quits his office. And he stated the practice that the late sheriff assigns all prisoners to the new sheriff by indenture upon his coming into office.

ERSKINE and WIGLEY, *contrà*, relied upon the above rule of court as warranting the attachment.

Lord ELLENBOROUGH, and LAWRENCE, J. asked them, however, if they could shew any case in which the *late* sheriff is attached for not making a return to a writ which ought to be returned by the present sheriff, and afterwards, the case standing over till the end of the term,

Lord ELLENBOROUGH, C. J. delivered the opinion of the Court, and after referring to several authorities, viz. Cro. *Eliz.* 365. *Hob.* 266. 1 *Bulstr.* 70. 9. 2 *Leon.* 54. 2 *Roll's Ab.* 457. *Dalt.* 516. 1 *Bulstr.* 72. 3 Co. *Rep.* 72. *Westby's case.* *Styles'* Practical Register, 587; and also the above rule of Court; concluded, that from the whole view of the practice, the present sheriff ought to have returned the writ with the *old* sheriff's

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THE KING *versus* The Sheriff of MIDDLESEX.

return thereon, and so stated what was done by the old sheriff; but that now the party comes too late, the rule to bring in the body having been granted on the 12th of *November*, 1803, and no notice taken of the irregularity till the 27th of *January*, 1804. Although, therefore, the attachment against the *old sheriff* was irregular, the

RULE WAS DISCHARGED.

PEARSON *versus* REYNOLDS, *Gent. one, &c.*

It is not *necessary to demand a plea where the* defendant *has taken out a summons for time to plead.*

PEARSON *versus* REYNOLDS.

BARROW moved to aside proceedings for irregularity in signing judgment without a demand of plea.

ESPINASSE, *contrà*, cited *Towers* v. *Powell*, 1 *H. Blac.* 87, and *Starkey* v. *Wilkes*, *Sellon's* Practice, 347, to shew that it was not necessary to give a demand of plea where there has been a summons for time to plead, and time given, as was sworn in this case.

Lord ELLENBOROUGH, C. J. "A demand of plea is unnecessary, and the practice of dispensing with it is reasonable in this case, for it can only be required where it may be presumed that the *defendant* may not have had notice; but the circumstance of the *defendant* having taken out a summons for time to plead *excludes* such a *conclusion*.—As it was objected that the cases cited in support of this practice all occurred in the Common Pleas, the Master handed up to the Court a note of a case which occurred in *this court* upon the same point."

RULE DISCHARGED.

HEYWARD *versus* RODGERS.—*February* 18. 1804.

It is not necessary that an assured *should communicate to the* insurer *circumstances relating to the* sea-worthiness *of the ship (unless particularly required, in which case concealment is fraud) because that is covered by the implied warranty. The correct rule is to communicate all which materially varies the object of the voyage, or the nature of the risk. Therefore, where a ship had been surveyed in the* West Indies, *in order to satisfy the freighters that she was sufficient to take in a cargo and proceed to* Great Britain *(she having got a bad character) this was held not necessary to be communicated; although evidence was given that if it had been known it would have excited suspicion, and the underwriters would have made further inquiries concerning the ship. As to all circumstances which operate only as* prudential motives *for the insurer undertaking the risk or not, but which do not vary the object of the policy or the* nature *of the risk, such as the built of the ship, her age, her repairs, &c. they should be specifically inquired into by the insurer before he takes the risk upon him.*

HEYWARD *versus* RODGERS.

ACTION on a policy of insurance on the ship *Eliza*, at and from *Trinidad* to *London*, with liberty to touch at *Demerara*, and the *Leewara* and *Windward Islands*, &c.—loss by perils of the seas.

The cause was tried before CHAMBRE, J. at the last assizes for *Lancaster*, and a verdict found for the *plaintiff*.

The defence rested first on the *want of* sea-worthiness in the ship, and the *not communicating* a letter received by the assured from the *captain*, which, it was said, contained information material to be known by the insurers. The ship sailed from *Liverpool*, and arrived safe at *Trinidad*, and on the 29th of *January*, 1802, *Maclain*, the captain, wrote to inform the owners of his safe arrival, and that he had had certain repairs done, "that he had got the ship cleared, and that the carpenter had got her all caulked, and that she was in good order, but that he had got her surveyed on account of her bad character." This

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letter contained the survey, dated *Port* ———, *Trinidad*, *Jan.* 22, 1802. "We have attended the survey of the ship *Eliza*, &c. and we all certify that the said ship is *sufficient to take in a cargo, and to proceed to any port in* Great Britain, *and with safety.*" This was had in consequence of the master of an *African* ship, which had just arrived, having given out, that the *Eliza* was old and bad, and having offered to carry goods at a lower rate, and the person to whom application had been made for freight, refused to send a cargo. She afterwards sailed to *Martinique*; but in her way thither struck upon a reef of rocks, and was upon the rocks half an hour, in consequence of which, when she arrived, she was surveyed again, and condemned as unfit to proceed on the voyage, and it being found impossible to repair her there, for want of proper materials, she was sold for 849 dollars, about 89l. sterling, although she was insured for 1200l. She afterwards sailed in ballast to *America*, and arrived. The learned Judge thought that the want of sea-worthiness was not proved; but that the letter, with the certificate, which had been received previous to the insurance, ought to have been communicated; and in order to prove it to be material, two witnesses were called, who proved that it was usual in the *West Indies*, to get a survey, where a ship has a bad character, in order to get a cargo, and to satisfy the underwriters; but that these surveys were in general so fraudulent and suspicious that it is the constant practice where a survey has been had in the *West Indies*, to inquire further before the insurance is effected.

On a motion for a new trial,

PARK, in shewing cause, argued that, whether this letter, with the certificate of the survey, was material to be communicated, was a question entirely for the jury to decide. That this case must be governed by that of *Schoolbred* v. *Nunn* (*), in which Lord *Mansfield* laid down as a general rule that the assured need not state

(*) *Park's Ins.* 229.

that which is matter of warranty. That this letter only related to the *sea-worthiness* of the vessel; and it being an implied warranty that she was *sea-worthy* at the time of the insurance, it is not necessary to state to the insurers the condition in which the ship appears to be at every port at which she touches. That the survey itself was not made through any real apprehension of the want of sea-worthiness, but in order to satisfy the *freighters*.

SCARLETT, *contrà*, urged, that the survey being taken, amounted to more than a suspicion of the bad condition of the ship by the captain himself, and might materially affect the insurance, as there might be degrees of sea-worthiness, and degrees also of difference in the risk. The insurance being with liberty to touch at all the islands in the *West Indies*, it might be material to know that the ship had a bad character, and probably would be compelled to go to the other *islands* for a freight which would doubtless increase the risk, and he relied much on the evidence of the two underwriters given at the trial, and observed that the certificate imported only that the *ship* was *sufficient* to take in her cargo, and proceed to any *port* in *Great Britain*, and though sufficient for that purpose, she might not be fit to go further about for a *cargo*.

THE COURT took time to consider, and afterwards Lord ELLENBOROUGH, C. J. delivered the opinion of the Court. After stating the question to be entirely on the materiality of the letter and certificate, which were not communicated; and referring to *Carter* v. *Boehm*,* where Lord *Mansfield* says, "that the reason of the rule, which obliges the party to disclose, is to prevent fraud and encourage good faith: it is adapted to such facts as vary the nature of the contract, which one privately knows, and the other is ignorant of, and has no reason to suspect." The question, therefore, has always been, whe-

* 3 *Burr.* 79, 85.

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Heckscher and Others *versus* Gregory.

The cause was now tried before Lord Ellenborough, C. J. at *Guildhall*, and he nonsuited the *plaintiffs*, because an actual *resale* and *transfer* of the stock was not proved to have been made till after the commencement of the action. The bargain was one of those which had been made on the false report of peace on the 5th of *May*, 1803. The *plaintiffs* resided abroad, and before the resale, their *broker*, one *Eliason*, wrote to them for instructions, in consequence of which he received orders to resell, in order to bring an action against the *defendant*. He accordingly *contracted* for the *resale* of the stock with a third person on the 9th of *June*, but on account of the stocks being then shut, an actual transfer was not made till the 6th of *July*, 1803, which was the earliest day on which it could be done. The *Nisi Prius* record was entered with a memorandum of the 25th of *June*.

On a motion for a new trial, which was argued by Gibbs, for the *defendant*, and Erskine, for the *plaintiffs*, it was contended on the one side that the 7 *Geo.* II. c. 8. s. 6, required an actual *resale* and *transfer* to be made to the *plaintiff* before the action could be commenced; and on the other side, it was contended, that the *contract* of the 9th of *June*, followed up by a transfer made as early as possible, was to be considered as a *resale* on the 9th of *June*, within that section; for if any transfer at all was necessary that made on the 6th of *July* would have related back to the time of the contract.

Lord Ellenborough, *C. J.* "It appears to be the object of the act of parliament to prevent all dealings in stock, of which the parties are not proprietors at the time. It therefore directs that in order to compel performance of contracts for sale of stock, the party must in the first instance either make an actual *transfer* to the buyer under the 5th section, or in case, from the *insolvency* of the party, he could not safely make an actual transfer to him, and there should be another person sub

stituted in his place, there must be an actual transfer to the substituted person, and then the first buyer shall make good the *damage*. The 5th section provides for a *specific* performance of the contract; but there can be no specific performance where any thing remains to be done *executory*. It is clear, therefore, that the 5th section requires an actual *transfer*. Then, the 6th section provides that 'no person who shall *sell* any public stock to be delivered and paid for at a certain day, and which shall be 'neglected to be paid for according to such *agreement*, shall 'be obliged to transfer the same, but may sell such stock 'to any other person for the best price, and after such 'sale, receive, if the parties can agree, or *recover as aforesaid*, from the person who first contracted for the same, 'all the damage which shall be sustained thereby.' And there is a like provision as to the *buyers* of stock which the sellers refuse to transfer. So that instead of *transferring* to an insolvent person, the seller in the one case may *transfer* to the buyer or purchase and receive from another person the stock before sold; and the *difference* shall be the amount of the compensation. It is true that the 6th clause is open to the objection that the word *sell* is not used in the commencement of that clause, in its proper sense, but as relating to a *contract* or *inchoate sale*; but the context and spirit of the act shews that in the subsequent part of the same clause it is meant as a sale perfected by actual transfer and delivery of the stock, otherwise one might *contract* afterwards with several persons for the same stock, and pay or receive the difference without making a transfer; but there can only be one actual transfer of the same stock, and that was the security to which the government looked for the preventing of the practice of gambling in the funds. In this case it is indeed very unfortunate that the *plaintiffs* were not able to make an immediate transfer of the stock, for although it was a fair transaction, the stock was shut; but we cannot supply the omission of an actual transfer before the action brought, without which the *plaintiffs* cannot be entitled to recover."

Rule discharged.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

In the Court of King's Bench,

IN EASTER TERM,

In the Forty-fourth Year of King GEORGE III.

MAYOR, &c. of CARLISLE *versus* WILSON.—*April* 19.

Proof of toll thorough, *by prescription, for all merchandize and goods carried for hire, and paid for all packs carried by horses, and also on all goods carried in carts and waggons for hire, coming into the city of* Carlisle, *is evidence of toll due for goods carried for hire in a stage coach: the toll being substantially for goods carried for hire, it is immaterial in what kind of vehicle they are carried.*

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MAYOR of CARLISLE *versus* WILSON.

THIS was an action for *toll thorough,* claimed by the corporation of *Carlisle,* on goods carried for hire, and brought into the city. The claim to toll generally was founded on an ancient charter, granting to the corporation *Theolonium forinsecum et intrinsecum,* and was also proved by prescription; and it was clearly established in evidence that for time immemorial, a toll of 1d. had been taken for every horse carrying goods, and also, of 2d. on each horse drawing a cart carrying goods. The right to the toll *on goods,* carried for hire by a pack horse, or in a cart was clearly proved by prescription; but the toll, in this case, was claimed for a *box* carried in a *stage coach,* of which the *defendant* was the proprietor; and there was no evidence given of any toll being paid on such goods, except in some instances where the goods, principally fish, were brought into *Carlisle* in a cart, and then

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Mayor of Carlisle v. Wilson.

put into the coach to be carried on further. At the trial before *Chambre*, J. he thought the right to toll on goods carried in carts was clearly established; but, upon leaving the case to the jury, as to the payment of toll for goods carried in stage coaches, they found a verdict for the *defendant*.

Cockell, Serjeant, obtained a rule for a new trial, and cause was shewn against it by Parke, Holroyd, and Hullock, who contended, that forty or fifty years ago, when *stage coaches* were first introduced into *Carlisle*, no toll on the goods was claimed, and no notice was taken of them until about 15 years ago, when the claim was made, but never enforced; they also insisted that the evidence was of a toll only upon *commercial goods*, and that such a toll upon *goods* ought to be taken of the proprietor of the goods, and not of the carrier; and that in taking it so, the corporation could not be injured, but would have a right to distrain them for the toll.

Lord Ellenborough, C. J. without hearing the other side, thought that the right to toll was sufficiently proved. Substantially the right to toll, he thought, accrued on the carriage of the goods, whether carried on the backs of horses, or in carts or coaches, or *barouches*, or in any other vehicle of modern invention for carrying by land. That the reason why the toll had not been taken for many years was, that when stage coaches were first established at *Carlisle*, it was proved to be unusual for them to carry goods, so that it was of no importance to the corporation to claim it. It is more convenient for the community at large that the toll should be taken of the carrier rather than of the proprietor; and it would be less burthensome upon the public; for if it were to be received of the proprietor, it must be charged upon each box or parcel; whereas, it would now be estimated only upon the coach or other carriage. He observed, that stage coaches were but recently introduced into the northern counties. Bishop *Nicholson*, in his History of *Cumber-*

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land and *Westmoreland*, written as lately as 1710, says, he was obliged to travel as far as *Stamford* before he could get to a stage coach, when coming to *London* with a gentleman to whom he was the tutor.

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MAYOR of CARLISLE *versus* WILSON.

GROSE, J. LAWRENCE, J. and LE BLANC, J. concurring, the rule was made

ABSOLUTE FOR A NEW TRIAL.

WAIN *versus* WALTERS.—*April* 19.

Every memorandum of an agreement in writing under the statute 29 Geo. II. *c.* 3, *s.* 4, *to charge a* defendant *on a special promise, for the debt, default, or miscarriage of another, must be mutually binding on each party, and contain some memorandum or notice of the consideration of the promise, otherwise it is void; and the consideration cannot be supplied by parol, at least where the writing is wholly silent on that head.*

THIS was an action of assumpsit upon an undertaking by the *defendant* in writing to pay for the debt of a third person, as follows—"I do engage to pay by half past four o'clock this day 56l. and expences, on a bill on *Hall*." This was signed by the *defendant*, who was no party to the bill accepted by *Hall*. At the trial before Lord ELLENBOROUGH, at *Guildhall*, in the sittings after *Michaelmas* term, the *plaintiff* proved the undertaking in writing, and gave parol evidence of the consideration, namely, that the attorney having instructions to sue out writs against the indorser and acceptor, the *defendant*, in consideration that he would refrain from so doing, signed the above engagement to pay the money due upon the bill, and the expences. * The charge for the writs would

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* The writs had not actually been sued out.

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considerably increase the expences, and the attorney had no other cause for not proceeding than a reliance upon this undertaking. Lord ELLENBOROUGH, C. J. *non suited* the *plaintiff*, because there was no *consideration* stated in the written agreement given in evidence.

MARRYATT, for the *plaintiff*, obtained a rule *nisi* for a new trial in *Hilary* term last, contending that it was not necessary, under the statute of frauds, that the consideration should appear on the face of the written instrument, which is required by the statute as evidence of the agreement; and assimilated this to the case of a sale note, in which he said there did not appear to be any mutuality in the agreement expressed in writing." LAWRENCE, J. on this observed that the words "*bought* of *J. L.* so much goods," necessarily implied a mutual agreement as well of *selling* as *buying*, since there never could be a buyer without a seller. And now,

GARROW and LAWES shewed cause for the *defendants*, and contended, that an *agreement* means something in which two parties are concerned; and must therefore contain in itself some evidence of mutuality or reciprocity in the terms. That in this case, without going out of the written paper, it was impossible to collect any mutuality of agreement, and therefore no consideration appears, for it neither shews that he was undertaking to pay a debt of his own, nor of another person, in which latter case there would be no consideration whatever apparent on the paper itself, for his undertaking to pay it; and they cited *Preston* v. *Merceau*,* and *Cunnis* v. *Erhart*,† which, in principle, they said, governed this case.

ERSKINE and MARRYATT, *contrà*. "The cases cited went entirely upon the principle that the parol evidence offered was contradictory to the written agreement, and for that reason could not be received; but the parol evi-

* 2 *Bl.* 1249. † 2 *H. Bl.* 283.

dence offered here is only to explain the agreement. The statute of frauds * makes no alteration in the nature of promises or agreements, but only requires a new mode of proof. The words of the statute are, that "no action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or whereby to charge the *defendant*, upon any special promise, to answer for the debt, default, or miscarriages of another person; or to charge any person upon any *agreement*, made upon consideration of marriage, &c., unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The word *agreement*, in this clause, as it relates to actions upon promises to pay the debt of another person, is not to be taken in the strict legal sense of an agreement, importing a contract, containing all the stipulations on both sides, but as a term synonymous with the word promise, to which it refers. For the word *agreement* is not introduced into the clause till it comes to speak of *agreements* in consideration of marriage, and the other contracts and agreements expressly mentioned. The statute having been drawn by Lord *Hale*, who must have known the *technical* import of the word *agreement*, he must have omitted it purposely in the first part of the clause, which speaks of charging a *defendant* upon his *promise*; and the concluding part, that the agreement or some memorandum thereof shall be in writing, must be taken *reddendo singula singulis*, and it must be understood to require only that the *promise*, wherewith the party is to be charged, should be in writing. The word *agreement*, as defined by *Plowden*, is *aggregatio mentium*; but yet, as it is used in this statute, it may be satisfied by any written note which proves the *engagement* of the party. The 3d, 7th, and 17th sections of the

* 29 C. II. c. 3, s. 3.

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statute shew that where it is necessary to state the agreement between both parties, it must be signed by both.*

Lord ELLENBOROUGH, C. J. "In all cases in which the words of any particular statute have not received, by long and established usage, a clear construction different from their ordinary meaning, I always incline to give to them that meaning which they naturally import; and that, whether it be a statute recently passed, or one long since enacted, but upon which no decision of the courts has yet been had to affix a different meaning to the words. The question here is, whether the word *agreement* is to be understood in a lax sense, as an engagement merely, or in its more technical meaning as an *agreement* strictly speaking. The words of the statute ought to receive a strict construction, when we consider that the person by whom it was penned was one of the most enlightened and the most learned, one of the wisest and the best of men, the venerable Judge *Hale*, who it may be presumed would use no words lightly, and could scarcely err from ignorance in the use of any which he has employed to convey his meaning. Here the word *agreement* is used with peculiar propriety and judgment. The first part of the clause declares that no action shall be brought whereby to charge the *defendant* on any special promise for the default of another, and afterwards it proceeds, 'unless the agreement, or some note or memorandum thereof, shall be in writing.' Thus the author of the statute clearly distinguishes between the nature of the promise upon which the person is to be charged, and the agreement which is to be put in writing, and he has foreseen all the mischief which might have arisen from requiring that the promise, or agreement on one part only, should be reduced into writing. For if it were only necessary to state the *promise* in writing, then the *consideration* which might, as in this case, be a condition precedent, altering

* 7 *Ves* jun. p. 265, was cited.

the very nature and substance of the agreement, would rest upon the conscience of the party, as it did before the statute, to be proved by parol. This would defeat the great object of the statute itself. But, as the word *agreement* stands here, it must be taken according to its technical sense; and there is no other sense than that which is given to it by *Plowden* in his Commentaries, and accepted by *Comyns* in his Digest, viz. that it is '*aggregatio mentium* when two or more minds are united in a thing done or to be done;'* to which is added that 'it ought to be so certain and complete that each party may have an action upon it.' † And "every contract or agreement, obligatory, ought to have a *quid pro quo*.' § All this shews that the word *agreement* is not satisfied unless the *consideration* between both the parties appears. Unless you require this, you leave the party who is to take the benefit of the agreement to supply the consideration by parol which might afford him the means of setting up one very different from the real agreement between both parties."

GROSE, J. LAWRENCE, J. and LE BLANC, J. concurred; the two latter expressing some hesitation from a belief that, in general, very loose *engagements* in writing were relied upon by the parties supposing them to be sufficient under the statute of frauds; but they felt that the mischief of allowing a loose construction of the word *agreement* would be very great, and outweighed the inconveniences on the other side, and held, that the meaning of the word *agreement* in the statute was clear.

RULE DISCHARGED.

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* *Pl. Com.* 17, *a.* † *Ibid.* 5, *a.* § *Dyer*, 336.

1804. MASON *versus* VICKERY.—*April* 20.

The attorney for the defendant, *being under sheriff, and having summoned the jury, is no ground for a new trial after a verdict for the* defendant *in a case of contradictory evidence.* Semble, *the* plaintiff *should take advantage of it by challenging the array at the trial.*

MASON *versus* VICKERY.

READER moved for a new trial. This was an action by the *plaintiff*, an attorney at *Coventry*, for defending the *defendant* and three others, at the quarter sessions. The clerk to the attorney proved the business done. The defence set up was, that *Mason* had given credit to another person, and a witness was called to prove that one *Hawes* had agreed to pay the attorney, if he would undertake the cause for the *defendant*, and that *Mason* gave *Hawes* credit originally. *Hawes*, however, being called, contradicted all that this witness had said, and declared that he had never undertaken to pay. The jury found a verdict for the *defendant*, which, it was now contended, was contrary to the evidence; and READER offered an affidavit that the attorney for the *defendant* was the undersheriff who had the summoning of the jury.

Lord ELLENBOROUGH, C. J. "If that were the case, you might have challenged the array; not having done so, that circumstance must be laid out of our consideration, and there being evidence on both sides, it is the common case of a mere question of credit between the two witnesses, on which the jury have decided.

RULE NISI REFUSED.

LYDE *versus* HIGGINS and Another.—*April 20th.* 1804.

A surgeon attends a pauper for some time, giving credit to the pauper's father for payment of his bill; but he becoming unable to pay, and the pauper still continuing ill, the surgeon applies to the overseers of the poor, to know whether he shall continue his attendances at their expence; they say they will give no authority, but if he brings in a reasonable bill, they will see it paid. Upon motion for a new trial, held, the attendance of the surgeon being divisible, he may recover for the latter attendances on the credit of the overseers without proving a promise in writing.

LYDE *versus* HIGGINS and Another.

ASSUMPSIT by the *plaintiff* for his bill for attendances, &c. as a surgeon, upon a special promise by the *defendants*, who were overseers of the poor, to pay for curing a *pauper*. The *pauper* was a servant in place at the time, and the parish were in the habit of employing another surgeon for the ordinary poor. At first the *plaintiff* began his attendances upon the credit of the pauper's father; but he continuing ill for some time the surgeon applied to the parish officers (the *defendants*) to know if he should continue to attend him and they would pay his charges. The *defendants* said "they would give no authority, but if he brought in a reasonable bill, they would see it paid." LAWRENCE, J. at the trial, on the *Oxford* circuit, summed up in favour of the *defendants*, but the jury found a verdict for the *plaintiff*; and ABBOTT now moved for a new trial, contending that the promise proved was not sufficient, that there was no consideration, and that the undertaking to see the *plaintiff* paid should have been in writing.

Lord ELLENBOROUGH, C. J. "If there was a special promise, I think there was a sufficient consideration, for the attendance of the *plaintiff* is divisible, and then it is not merely a promise to pay the debt of another, but a promise upon a consideration moving to the *defendants*.

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LYDE versus HIGGINS and Another.

There was some evidence of a promise, upon which the jury might found their verdict."

RULE NISI REFUSED.

BORDENAVE *versus* GREGORY.—SAME *versus* BARTLETT. *April* 30th.

On a sale of stock, the plaintiff, *in an action on the* 7 Geo. II. *c.* 8, *s.* 6, *must prove an actual tender to transfer, and a refusal by the* defendant *to accept, or that he the* plaintiff *attended at the close of the books on the day when the transfer is to be made, at the place of transfer, which is the only thing equivalent to an actual tender and refusal.*

Semble, *that the resale or repurchase of the stock, in case of default in performing a contract for stock, to be made under the* 7 Geo. II. *c.* 8, *s.* 6 *or* 7, *need not be on the day that the transfer ought to have been made, on the original contract, nor on the next day; but that it is sufficient if it be made with reasonable promptness, and that the amount of the damage is not strictly confined to the price contracted for, and the price on the* resale; *but may be estimated by the jury, taking into consideration whether the* plaintiff *might and ought to have sold earlier, and at a price more advantageous for the* defendant. *But the Court thought this point unfit to be decided in the present case.*

BORDENAVE versus GREGORY.

THESE were actions of assumpsit on the 7 *Geo.* II. c. 8, s. 6, for loss on the resale of stock, which the *defendants* had first contracted to purchase, tried before Lord ELLENBOROUGH, C. J. at *Guildhall*, in the sittings after *Michaelmas* Term, 1803. The declaration in the first case stated a contract on the 5th of *May*, 1803, by the *defendant*, for the purchase of 2000*l.* stock in the 3 per cent. consols at 69¼ per cent. "in consideration whereof the *plaintiff* undertook that he would transfer and cause to be transferred the said 2000*l.* capital stock in the books of the governor and company of the Bank of *England*, upon payment by the *defendant* of the said price for the same, when the *plaintiff* should be thereto

afterwards requested; that the *defendant* undertook to accept the same upon request, and averred that the *plaintiff* was ready and willing to have transferred, upon payment of the price, and that he requested the *defendant* to accept the same, and pay the price. Nevertheless the *defendant* did not, nor would not, when so requested, or at any time afterwards, accept the same, &c. In a second count, the *plaintiff* averred, that although he was ready and willing to transfer, yet the *defendant* before the *plaintiff* had transferred, or been requested so to do, declared and caused to be declared to the *plaintiff*, that he (the *defendant*) would not in any wise abide by or fulfil the said contract, to wit, at, &c. and hitherto wholly refused so to do, or to do any act in furtherance or performance of the same, and then and there wholly discharged the *plaintiff* from transferring or causing to be transferred, &c.

These were cases arising out of the transactions of the 5th of *May*, 1803, when there was a false report of peace *. One *Meyer*, the broker for the *plaintiff*, proved the sale, &c. and that it was usual to apply to the buyer

* On the 5th of *May*, 1803, a person, habited like a king's messenger, delivered a note at the *Mansion House*, directed to the *Lord Mayor* of *London*, from his majesty's principal secretary of state, informing him that peace was concluded between *Great Britain* and *France*. This note the *Lord Mayor* immediately made public at the *Stock Exchange* and other places: and, upon the faith of it, the stocks rose suddenly to a very considerable price above that of the previous day. Bargains for immense sums were made, when, in a very short time, the letter was discovered to be a forgery. Some persons refused to fulfil their contracts, and a committee of the *Stock Exchange* declared all contracts made on that day void. The books of all brokers being examined by them in vain for the purpose of discovering the

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of stock on the day when the transfer is to be made, to give in the name of a person to whom it shall be transferred, and if he neglects to do this before one o'clock that day, he is considered as a defaulter. That on the 6th of *May* he applied to the *defendant* to accept the stock, and asked him to give a name; that he never did so, but he could not be certain whether he made a like application to him on the 5th of *May;* that at first he said he would inquire of others, and would abide by the determination of the *Stock Exchange* on the subject, and if others paid he would accept the stock; but that afterwards, on being asked, he said if the stock had been transferred into his name on *the day* (the 5th of *May*) he would have paid for it. The witness, however, could not say whether the *plaintiff*, either on the 5th or the 6th of *May*, attended at the transfer office to make a tender of the stock. That it was afterwards (on the 12th of *May*) resold to another person at 64⅛ per cent. in pursuance of the 7 *Geo.* II. c. 8, s. 9; that had it been sold on the 4th it would have been more disadvantageous to the *defendant*, for that the medium price of stocks on that day, (immediately after the falsehood of the report of peace was discovered) and subsequently was lower than on the 12th. The *defendant*'s counsel cited *Lancashire* v. *Killingworth**, and the *Duke of Rutland* v. *Hodgson*†, at the trial, and insisted that as no actual tender and refusal was made, the *plaintiff* ought to have attended on the whole of the 5th of *May*, at the Transfer office, until the close of the books, in order to shew that he was ready to transfer, as the *defendant* had

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perpetrators of the fraud, a reward of 500l, was offered, but the forger was never known. Several persons acquiesced in the decision of the *Stock Exchange* committee, but in general where the bargains had been made for actual transfers, actions were brought.

* 1 *Ld. Raymond*, 686.

† *Strange*, 777; see also *Strange*, 57. 504. 533. 872, concerning tenders of stock.

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the whole of that day to perform his contract, and could not be considered as a defaulter till the last minute had elapsed of the time when the transfer was to be made; and they insisted that the *plaintiff* ought also to have averred in his declaration that he did so attend at the Transfer office at the close of the books, there being no other mode of supplying the want of an actual tender. They proved also that it was the usual course, in case of default made on the day, to procure a cryer at one o'clock of the same day, who stands on a table and proclaims that he is going to sell the stock of a defaulter. They also made a second point, which his lordship reserved at the trial, namely, whether the resale of the stock to a third party, in order to found the action, ought not to have been made on the 5th of *May*, or at farthest on the 6th, which was the next transfer day. His lordship left the case to the jury to say, whether, upon the whole of the case, the *defendant* had broken his contract, and the resale of the stock was made within a reasonable time. The jury found a verdict for the *plaintiff* for the amount of the difference of the stock at the two prices of 69¼ per cent. and 64 per cent. which latter was a medium price, the stocks having fluctuated between 65¼ per cent. and 62¼ per cent.

On a rule to shew cause why a new trial should not be had on the first point, or a nonsuit be entered on the second,

ERSKINE and RICHARDSON, for the *plaintiff*, shewed cause, and on the first point insisted, that as it was proved that the *defendant* never intended to accept the stock, and the jury had found him a defaulter, the verdict ought to stand. That the case of *Lancashire* v. *Killingworth*, was upon *demurrer*, in which case it was not certain whether the *defendant* might not actually have wished to accept the stock at the day. That it was entirely for the jury to say whether the *plaintiff* had done all that was necessary on his part. That the *defendant* saying that he would have paid the difference if the stock had been transferred into his name on the day, (the *plaintiff* not being

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bound to have made such a transfer, completely negatived his being willing to accept the stock, and rendered an actual tender on the day unnecessary.

GARROW and GIBBS, *contrà*, were stopped by the Court.

Lord ELLENBOROUGH, C. J. "In this case there must either be a formal tender and refusal on the day, or the party must wait the whole of the day, and be at least ready to do it at the end of the time. This is clearly to be collected from the cases cited for the *defendant*. Here it does not appear with certainty that there was an actual tender of the stock made on the day. A refusal to accept the stock would indeed have made an actual tender unnecessary; but in the absence of both these it is necessary that the *plaintiff* should shew that he has done every thing on his part to perform his contract, and he must do that which is a substitution for a formal tender, and which is the only thing that can be done when the other party is absent, and cannot be applied to either to accept or positively to refuse; that is, he should stay at the place where the transfer was to be made on the day agreed upon till the last time when the acceptance can be made. It does not appear that the *plaintiff* did so, and that is the only thing which can supply the want of a tender and refusal."

The other Judges concurring, the verdict was set aside, and a new trial granted.

GIBBS, for the *defendants*, then wished to argue the other point in order to have a nonsuit entered; and contended that it was necessary that the *plaintiff* should sell immediately after he was assured that the *defendant* would not perform his contract; and it must be taken that it was at an end on the 5th of *May*. That the act required that the accounts between the parties should be closed without delay, for that the amount of the damage was to be ascertained by the comparison of the contract price

and the price on the resale; and that evidence was given of the price of the stock on the 9th, 10th, 11th, and 12th days of *May*; and that he might have sold on either of those days.

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Lord ELLENBOROUGH, C. J. "The act of parliament in order to prevent gambling transactions, enacts, that no differences of stock shall be settled in any other mode than that provided by the act, and that there shall be an actual transfer made to a third person for the best price that can be gotten, in case of the refusal of the buyer to accept it, and that the seller shall recover of the buyer and defaulter the damage to be sustained thereby. But the time within which the actual transfer should be made is not fixed, and it can only be ascertained by considering the reason of the thing, which is, that it shall be done with reasonable promptness. The question in this case, therefore, is, whether it was sufficiently left to the jury to say whether it was done with convenient promptness, and whether they have found rightly. As to this latter point, it must be recollected what was the situation of the parties with whom the *plaintiff* was dealing. Nearly all the persons who contracted for stock that day were guided considerably by the conduct of others. Having made several contracts for sale under those circumstances, the *plaintiff* had no reason to think, until he had got the refusal of all, but that by getting others to agree to accept the stock, he might induce the *defendant* to perform his contract. So it stood up to the 1st *May*. Then Mr. *Bordenave*, finding himself trifled with (admitted not by the *defendant*, but by the other parties) resolves to sell and stand on his rigid rights at law. The jury found that he had been in doubt up to the 11th, and that it was a reasonable time to sell on the 12th of *May*. It has not yet been laid down that the price of sale, at the subsequent day, is to be considered as the strict amount of the damage. There is no word of reference in the act, and, therefore I would not be concluded by any thing that is said as to what may have been decided, on that part

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of it which relates to the necessity of making an actual transfer. The jury had here sufficient evidence to decide upon, and they have found the fact that it was within a convenient time. The ground on which I think the verdict right in this respect is that the several parties who had purchased stock were acting originally as a body; that at first there were doubts whether these contracts should be fulfilled or not, but at length one *Hancock* and others declared the contract void; that the *plaintiff* waited, with a reference to that doubtful state of affairs up to the 11th; hoping the *defendant* would be induced to complete the contract; and that the jury have found that the sale was obeyed with a reasonable promptitude."—His Lordship, therefore, concluded, that the verdict was, in this respect, well-founded.

After some consultation with the rest of the Judges,

LAWRENCE, J. said he thought it would be better to wait a little, in this case, before the Court came to a decision upon this point, as there must be a new trial on the former. But, he thought with his Lordship, that it was not necessary that the party should be bound to sell on the last day for performing the contract, or on the next day after. But if the party sold afterwards, he was inclined to think, that should he wait till the funds fell ten per cent. he could not recover that ten per cent. loss; but that if he might have sold at *one half* per cent. loss, it should be left to the jury to say whether the damage to the *plaintiff* arose from the *defendant's conduct*, or the *plaintiff's* own neglect.

LE BLANC, J. also observed that this was too important a question to be decided on a motion to enter a nonsuit, or for a new trial. As to the construction of the 6th clause, from which it was supposed, that by the words "after such sale the party shall recover of the person contracting for the same, all the damage to be sustained thereby," the amount of the damage was to be strictly settled by the price of such sale; the expression was varied in the next

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(the 7th clause) in which when a seller of stock has not made the transfer, the buyer is to pursue a similar course as in the former "and shall recover the damage which shall be sustained by reason of the not delivering, or not transferring the stock." "The damage to be sustained thereby," may not therefore be in all cases the difference between the contract price to the defaulter and the actual sale price to the transferree.

Lord ELLENBOROUGH, C. J. added, "I own I thought, until I looked narrowly into the act, that the words "*the damage to be sustained thereby*," were to be construed strictly; but, I think, they may receive the construction put upon them by my Brethren."

In the case of *Bordenave* v. *Bartlett*, there was not the same difficulty on the first point, and the Court thought the *plaintiff* relieved from it; but as the second point was still open, and it was determined not to decide it, the rules were ordered to be enlarged in the two actions, as to the second point, until a new trial was had in the first action of *Bordenave* v. *Gregory*.

DOE *on the several demises of* W. STEVENS *and* R. PAINE *versus* GEORGE SNELLING, *an infant, &c.* BETTY IVOLD, *and* W. SIMMONDS.—*April* 27.

A Testator, after several bequests of personalty, and also after devising certain lands to G. S. *devises as follows:* "*Also, I give and bequeath unto the said* G. S. *and* Sarah *his wife, all that my messuage, &c. at* B.; *also, all that my messuage &c. in* W.; *also, all and singular my goods, chattels, rights, credits, ready money, and personal estate, of what nature and kind soever as I shall die seised and possessed of, interested in, and entitled unto, after having thereout first paid and discharged all my just debts and funeral expences. Also, subject to the payment thereout, all the aforesaid legacies; and I nominate the said* G. S. *to be sole executor,* whom I charge *with the payment of all my just debts,*

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funeral expences, and legacies:" Held, that by virtue of the personal charge, for payment of debts, &c. on G. S. in the latter clause of the devise, he took an estate in fee in the messuages, &c. in B. and W.

EJECTMENT for certain premises in *Bromley* and *Wonersh*, in com. *Surrey*, tried before Lord Ellenborough, C. J. at *Kingston* summer assizes, 1803, and the following case reserved.

Sarah Dabner, widow, seised in fee of the premises, by her last will, dated the 27th of *July*, 1785, devised as follows:—"Concerning my worldly estate I give and dispose thereof as follows, viz. I give and bequeath unto *Michael March*, of, &c. *one shilling*; also, I give and bequeath unto *Ann*, wife of the said *M. M. two shillings*; also, I give and bequeath unto *Elizabeth Stevens*, wife of *James Stevens*, of, &c. the sum of fifty pounds; also, I give and bequeath unto *George Stevens*, of &c. the sum of forty pounds; also, I give and bequeath unto *T. Stevens*, of, &c. fifty pounds; all which said sums to be respectively paid in twelve months after the time of my decease. Also, I give and bequeath unto *George*, son of the above named *George Stevens*, the sum of ten pounds; Also, I give and bequeath unto *Elizabeth*, daughter of the first named *George Stevens*, ten pounds; also, I give and bequeath unto *Sarah*, daughter of the first named *George Stevens*, the sum of ten pounds; which three said sums of ten pounds each to be paid unto them the said *George, Elizabeth*, and *Sarah*, when they shall respectively arrive at the age of twenty-one years. And if either or any of them should happen to die before *he, she, or they* shall respectively arrive to the age of twenty-one years, the sum or sums so coming to *he, she, or they*, so dying, to be paid to the survivor of them. Also, I give and bequeath unto *George Snelling*, of &c. "All that my messuage or tenement, &c. land, and premises in *W.* in the county of *Bucks*; also, I give and bequeath unto the said *George Snelling*, and *Sarah* his wife, all that my messuage or tenement, farm lands, and premises, situate in *Bramley* aforesaid; also, all that my messuage or tenement, &c. situate in *Wonersh* aforesaid; also, all and sin-

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gular my goods, chattels, rights, credits, ready money, and personal estate, of what nature and kind soever as I shall die seised and possessed of, or entitled unto, after having thereout first paid and discharged all my just debts and funeral expences; also, subject to the payment thereout, of all the aforesaid legacies. And I nominate, constitute, and appoint the said *George Snelling* to be sole executor of this my last will and testament; *whom* I charge with the payment of all my just debts, legacies, and funeral expences."

The lessors of the *plaintiff* are the heirs of *Sarah Dabner;* the *defendant, George Snelling,* is the infant son and heir of *George Snelling*, the devisee, who survived *Sarah* his wife, and died in possession of the premises in *February,* 1803; the other two *defendants* are the tenants in possession.—*Question:* Whether the *plaintiff* is entitled to recover.

Lawes, for the lessee of the *plaintiff,* contended that only an estate for life passed by this will, to *Snelling and wife,* unless the charge to pay the debts could be applied to the estate left to them. That when there is a charge for the payment of debts, and a devise of both realty and personalty to any one, the law presumes that the testator means to make provision for his debts according to the ordinary course of the law, out of the personalty in the first instance; and when it is equivocal on which fund the charge shall be made, the Court would not intend it to be upon the realty. That by the words *"after having thereout first paid all debts and legacies,"* they were charged only upon those funds and not upon the person; and that in the subsequent clause, having appointed *Snelling* his executor, and in the same sentence charged him with payment of the debts, the testator must be supposed to have charged with the debts only *qua* executor; that the charge was not upon the persons to whom the estate was given, which might raise an inference that the charge was made in respect of the estate, but upon the estates

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first, and then upon the executor, who by law would be charged with the payment of the debts. That by the word "*also*" repeated at every clause, each sentence became a separate devise; and the charge of the debts, &c. could not be upon *Snelling and wife* in respect of the estate given to them; and he cited *Canning* v. *Canning*,* *Dickens* v *Marshall*,† *Doe* dem. *Palmer* v. *Richards*,‡ and *Doe* dem. *Moore* v. *Mellor*,§ and also 1 *Salkeld*, 239, and *Doe* dem. *Willey* v. *Holmes*.‖

Bosanquet, *contrà*, was stopped by the Court; and

Lord Ellenborough, C. J. after reading the several clauses of the will, said, that in the first devise of the messuage, &c. to *George Snelling* and *Sarah* his wife, it was introduced with the words "*I give and bequeath*"; but those words not being repeated with the word "*also*," there was no separation of the sentences, and the devise of these estates, and the residue of the realty and the personalty was all mixed together. That the subsequent charge on *George Snelling* was a charge attaching upon him personally; in which case, according to the doctrine in *Doe* dem. *Moore* v. *Mellor*, and the other cases, this charge would carry the fee; since the distinction is, that where there is a charge for the payment of debts or legacies, or an annuity, which affects the person of the devisee, [and not the estate merely, in which latter case nothing would pass till payment of the debts, legacies, or annuity], there the fee passes; because otherwise the devisee might be injured by the devise; and that the estate would not be commensurate with the charge unless the devisee took the fee.

Grose, J. "Read '*and*' instead of '*also*,' and the whole

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* *Moseley*, 246.

† *Cro. Eliz.* 330.

‡ 3 Term Rep. 356.

§ 5 Term Rep. 558. 6 Term Rep. 175; and 1 *B. & P.* 246. 558.

‖ 8 Term Rep. 1.

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devise will be but one sentence. As to one of the arguments at the bar that because it is the duty of the executor to pay the legacies, the charge on *Snelling*, must be only considered as a charge *qua* executor, and particularly so because the first devise of the house, &c. in *Wonersh* is only to *G. Snelling*, whilst the devise of the house, &c. in *Bromley* is to *G. Snelling and his wife*, and the devise as executor is only to *G. Snelling*, I confess it struck me at first; but it is probable the testatrix thought that the husband was the most likely to become active in the management of her affairs, and therefore mentioned only him as the person to pay the debts, &c. although he had charged both before in respect of the estate; and we must consider that as well the realty as the personal estate was previously charged with the payment of the debts and legacies. Saying that the intent of the testatrix was that *Geo. Snelling* should take an estate in fee is only saying that which would apply in ninety-nine cases out of an hundred, for I scarcely know a case in which a testator left a house to a *legatee*, without adding a limitation for life, that he did not mean to give a fee.

LAWRENCE, J. cited *Goodright* v. *Stocker** and said that it must be a devise in fee unless it could be held that the devise to pay debts out of the estate applies to the personalty only. That though the *words having thereout first paid all my debts*, and the words *also subject to the payment thereout of all the legacies*, are found in the residuary clause which includes the personalty as well as the realty; that sentence is not complete alone, and it is necessary to go back to the former part beginning at *also I give and bequeath, &c.* without which there would be no devise or bequest at all. That the word *also* means only *and*. That the word *thereout* refers to the first as well as the last part of the whole sentence, in which the devise of the realty and the personalty is included. And he added, that in old wills

* 5 Term Rep. 17. 13.

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it was no very uncommon thing to appoint a person, besides the executor, as a sort of supervisor and assistant to him; and that though *Snelling* and wife were first charged in respect of the estate, the repeating the charge, when *Snelling* was constituted executor, might be considered with a view somewhat similar to the former custom in the old wills, considering him as likely to be most active. That it might raise a question whether he was not also entitled to the fee in the other lands; but of that he would give no opinion."

Le Blanc, J. concurred; and said that this case fell even within the case of *Baddeley* v. *Leppingwell*.*

Postea to the defendants.

Roe, *on the demise of the Right Hon.* Thomas Conolly, v. Henry Vernon, *Esq.* Richard Wm. Howard Vyse, *and Others.—April* 25.

A Tenant of customary tenements, held by copy of court-roll, in the manor of Wakefield, *in the county of* York, *of two sorts, the one for which a fine certain by ancient custom is paid, and therefore called* compounded; *the other, for which a fine arbitrary is paid, and which is called* uncompounded, *surrenders to the use of his will "All and singular the messuages, &c. in the manor of* W. *being of the yearly rent to the lord in the whole of* 4*l.* 10*s.* 8½*d. and compounded for; the rent to the Lord in fact not amounting to* 4*l.* 10*s.* 8½*d. for the* uncompounded *tenements alone: Held, that notwithstanding this mistake the compounded lands, only, pass by the surrender.*

He afterwards, by his last will, charges all his real estate *in the counties of* York, Nottingham, *and* Lincoln, *with two annuities and "as to all his* freehold *manors, messuages, lands, &c. in the counties of* York, Nottingham, *and* Lincoln, *and elsewhere, in Great Britain, subject as to the said premises in the counties of* York, Nottingham, *and* Lincoln, *to the said two annuities, devises them to his first and other sons in strict settlement successively, with divers remainders over: Remainder "of all his* said *manors, messuages, lands, tenements, and* hereditaments, *in*

* 2 *Burr.* 1190.

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the said county of York, *to his eldest daughter for life; remainder to her first and other sons, &c. remainder to his two other daughters successively in like manner; and* "*as to all his manors, lands, and hereditaments, in the counties of* Nottingham, *and* Lincoln;" *remainder to his three daughters and their heirs in common: And* 'as to all other his manors, messuages, lands, tenements, and hereditaments whatsoever and wheresoever, either freehold or copyhold, except those in the said counties of York, Lincoln, *and* Nottingham, *which he had already so disposed of by his will as aforesaid,*" *subject to the said rent charges, and also to legacies in aid of the personalty, he devised the same in failure of issue male of his eldest son and of his own body, to his three daughters and their heirs in common. The customary tenements in* Wakefield, *in the county of* York, *though held by copy of court-roll, were not stated to be at the will of the lord, and the tenants of estates of inheritance therein were entitled to the coal, mineral, and trees, &c. therein; but by a decree in the duchy court of* Lancaster, *in the reign of* James I. *confirmed by act of parliament, the tenements of the said manor were decreed to be copyhold tenements. held according to the custom of the manor; but not stating at the will of the lord or as parcel of the manor, though in the same pleading, it was confessed, by the tenants, that they were parcel of the manor: Held, that these customary tenements did not pass to the eldest daughter under the first remainder of the freehold lands in York, &c. either by the express words of that devise or by implication from the exception contained in the residuary clause to the testator's three daughters, &c. whether they are customary freeholds, held by copy of court-roll, or copyholds strictly, and parcel of the manor. The word* "freehold," *in the above devise, must be construed according to its ordinary import, and would therefore not include* frank tenements *held by copy.*

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EJECTMENT for customary tenements in the manor of *Wakefield,* in the county of *York,* tried before Rooke, J. at *York* Lent assizes, 1803, and a case reserved in substance as follows:—

"The customary tenements of the manor of *Wakefield,* are of two sorts, *compounded* and *uncompounded,* that is, the compounded are liable to a fine certain upon alienation and descent, by reason of a *composition,* anciently, or heretofore made, with the lord of the manor; the uncompounded are those for which no such agreement has been made.

"*Thomas,* Earl of *Strafford,* being seised in tail male,

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which estate is now extinct, with reversion to himself in fee, of certain customary tenements, *compounded* and *uncompounded*, holden of the lord of the said manor, by copy of the court-roll, by rents and services, according to the custom of the said manor, and also seised of a moiety of certain tenements in the said manor, holden in like manner of the lord of the said manor, that is to say, of certain customary tenements compounded in fee, and certain customary tenements, uncompounded for, in tail general, which estate is still subsisting, with reversion to himself in fee, and also seised in fee of certain other customary tenements, which he himself lately purchased; according to the custom of the said manor made a surrender out of court* of the customary tenements by the following description, "All and singular the *messages*, &c. tenements, and hereditaments whatsoever, with their and every of their appurtenances, situate, &c. at *Wakefield*, *Stanley*, &c. or elsewhere, within the said manor of *Wakefield*, which he the said Earl now holds of the lord of the said manor of *Wakefield*, in whose tenure or occupation the same now are, or be, being of the yearly rent to the lord in the whole of 4l. 10s. 8½d. *and compounded for.*"† This rent exceeded the amount of the lord's rent, for the compounded customary tenements of *Thomas*, Earl of *Strafford*; his father, *Sir W. Wentworth*, having in 167⁰, on his admission to the same, except those lately purchased by the said *Thomas*, Earl of *Strafford*, paid a fine for the customary tenements of 3l. 15s. being three years' rent, at the rate of 1l. 5s. for the lord's rent, and a fine of 80l. for his *uncompounded* lands. The whole of the rents paid by *William*, Earl of *Strafford*, hereafter mentioned, and his successors, for all the said customary tenements, *compounded* and *uncompounded*, amounted to 4l. 14s. 6d. of which 1s. 9d. was for the lands purchased by the said *Thomas*, Earl of *Strafford*.

* On the 10th of *April*, 1722.

† This surrender was not presented till 1741, after the death of the Earl of *Strafford*.

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" *Thomas*, Earl of *Strafford*, by his will dated the 22d of *June*, 1732, devised as follows: ' As to the worldly estate with which it had pleased God to bless him; In the first place, to his wife, ' out of all his *real* estates in the counties of *York, Nottingham*, and *Lincoln*,' an annuity of 2000l. in lieu of dower, ' out of any part of the real estate.' And after giving to her for life ' all that his copyhold messuage, &c. in *Twickenham*, in com. *Middlesex*,' and devising out of all his real and personal estate whatsoever, to his mother, an annuity of 200l. for her life, and the house in which she then lived, 'being copyhold,' in lieu of *her jointure*, &c. the will then proceeded as follows: ' *And as to all my* freehold *manors, messuages, lands, tenements, and hereditaments, in the counties of* York, Nottingham, Lincoln, Northampton, Suffolk, Kent, Surrey, *and* Middlesex, or elsewhere, subject, as to the said premises in the said counties of *Y. N.* and *L.*' to the said rent charges of 2000l. and 200l. ' and likewise subject, &c. to all legacies in aid of the personal estate, '*I do give and devise all my said freehold premises, from my decease, and also I devise my said two copyhold messuages, with the appurtenances, in* Twickenham *aforesaid, after the decease of my said mother and wife, unto my only son* William, *Lord* Wentworth, *for his life*,' without impeachment of waste, save voluntary waste, &c. with successive remainders in tail male to the first and other sons of his said son *Wm.* Lord *Wentworth*, &c.

" And in default of issue male of his, the testator's, body, he directed that the two rent charges of 2000l. and 200l. instead of issuing out of his manors in *Y. L.* and *N.* should, in ease of his brother, *Peter Wentworth*, and his heirs male, be charged upon ' all the rest of his *freehold manors, lands, and hereditaments whatsoever*,' in the like manner, and also upon a grant from the crown of certain *post fines*; but in case they should not be sufficient then to be made good out of the estates in *Y. L.* and *N.* He then devised, in failure of issue male of himself and his said son, ' all his manors, lands, tenements, and heredita-

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ments,' situate in the several counties of *Y. L.* and *N.* to his said brother, *Peter Wentworth*, for life, with several remainders over, to *William*, the son of *Peter Wentworth*, for life, remainder to his first and other sons in tail male, remainder to the second son of *Peter Wentworth* and his first and other sons, in like manner. He then devised as follows:

"And in default of such issue, I give and bequeath all that my capital seat at *Wentworth Castle*, at *Stainborough*, and all my *said* manors, messuages, lands, tenements, and hereditaments in the said county of *York*, unto my eldest daughter, Lady *Ann Wentworth*, during her life, &c. upon condition that she and her husband shall take the name of *Wentworth*," with remainder to her sons, in tail male, &c. with remainder under the like restrictions successively to his second daughter Lady *Lucy*, and to his third daughter Lady *Mary Wentworth*, and remainder over to his own right heirs.

"He then devised as follows: 'And as to all the said manors, lands, and hereditaments in the said counties of *Lincoln* and *Nottingham*, from and after my death, without issue male of my body; and also from and after the decease of my said brother, *Peter Wentworth*, without issue male of his body, I give and devise the same unto my said three daughters, Lady *Ann*, Lady *Lucy*, and Lady *Harriet*, and their heirs, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants. And as to all other my manors, messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, either freehold, or copyhold (*except those in the said counties* of *York*, *Lincoln*, and *Nottingham*, *which I* have already so disposed of by my will as aforesaid,' (subject to the said rent charges and to legacies) 'I give and bequeath, the same in failure of issue male of my said son *William*, Lord *Wentworth*, and of my own body to my said *three daughters*, and their heirs as tenants in common. The *testator* died siesed in *November* 1739. *William*, Earl of *Strafford*, his son entered and died without issue in 1791; Lady *Ann* intermarried

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with the right honourable *William Conolly*, survived her husband, and died in *February* 1794, leaving the lessor of the *plaintiff*, her only son, and heir male of her body.

The *defendant*, *R. W. H. Vyse*, is the grandson of Lady *Lucy*, and the *defendant*, *R. Vernon*, is the son of Lady *Harriet Wentworth*, also deceased. *William Wentworth*, the son of *William Wentworth*, the son of the said *Peter Wentworth*, in *March* 1791, became *William* Earl of *Strafford*, and entered upon the said customary premises, and died in 1799, without issue, leaving Ann *Kaye*, his sister and heir at law, *George Wentworth* having died without issue, but was never admitted tenant to any of the premises. He also in 1791, suffered a recovery of *Wentworth Castle*, and the other freehold premises in the county of *York*.

On the 11th of *February*, 1802, the lessor of the *plaintiff* was admitted, at a court baron, tenant to the customary premises, under a writ of mandamus, stating that he claimed under the above will, and, in the description of the premises, 'that some of them were of the nature of copyhold *uncompounded* for, and the residue compounded, and that they were granted by the lord to the said *T. C. to hold* to him and the heirs male of his body, according to the limitations of the said will, to be holden of the lord by the rents, fines, suits, &c. according to the custom of the said manor.

"On the 20th of *February*, 1802, the said *T. Conolly* suffered a recovery of the *compounded* part of the same premises, according to the custom of the manor.

Wentworth Castle, above mentioned is distant near ten miles from some parts of the manor of *Wakefield*, and fourteen from others, and is of freehold tenure. There is an old mansion and a close adjoining, of three acres of freehold at *Wakefield*, belonging to the *Strafford* family, whereof the testator was seised in fee.

"The manor of *Wakefield* was of *ancient demesne* of the crown of *England*, and the said customary premises, &c. in the manor have been always reputed *copyhold*, demis-

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able by copy of court-roll, to hold in fee-simple or otherwise, according to the custom of the said manor, but none of the grants are expressed to hold at the will of the lord of the manor.

"The case then set out an information by the attorney general of the *duchy of Lancaster*, in the reign of *James* I. against tenants of his majesty, of the manor of *Wakefield*, wherein they were mentioned to be *copyholders* of the said manor, at the will of the lord. The information alleged, that the fines were arbitrary, and that the tenants had unlawfully entered into certain parts of the waste, which had only then lately been demisable by copy of court-roll. The tenants pleaded, and confessed that a great part of the premises were copyhold, demisable, &c. and insisted that the fines were not arbitrary, but certain, in manner as the information charged, that they had pretended. Whereupon after partition to, and composition with, his majesty, it was decreed (27th *Nov.* 7th of *James* I.) that all the tenements, whether they had been parcel of the waste or not, which were then held and compounded for by the said *defendants*, should for ever thereafter remain good and perfect *copyhold tenements*, demisable, &c. any defect of the antiquity, validity, and continuance, thereof notwithstanding, &c. and at such rents as were then paid, as well for the said parcels of the waste as for other the copyhold tenements of the said manor, holden by the *defendants*. 'And further, that in future fines certain and therein specified, should be paid on admittances.' This decree was confirmed by the statute 7 *James* I. enacting, that the same tenements, in the decree mentioned, should be good and perfect copyhold lands, according to the true intent of the said decree, &c. saving, nevertheless, to all persons, their heirs, &c. other than the king, his heirs and successors, all their rights, &c. And the said decree was recorded, at length, in the court-roll of the manor of *Wakefield*, the 19th of *July*, in the 9th year of king *James* I.

"The *coal mines* and *minerals* within the customary tenements and the timber thereon, belong to the cus-

tomary tenants, who are seised of any estate of inheritance, and not to the *lord*.

"The lessor of the *plaintiff* has received one-third of the rents and profits of the customary premises for one year since *November*, 1801, and never took the name of *Wentworth*, and the *defendants* are in possession of the two other third parts."

Question—Whether the lessor of the *plaintiff* is entitled to the whole of the said customary tenements, &c. first mentioned, *compounded* and *uncompounded*; or to the compounded only; and to all the said moiety of the compounded customary tenements secondly mentioned; and to the whole of the customary tenements purchased by *Thomas*, Earl of *Strafford*, or to the compounded only, or any, and which of them. If the lessor of the *plaintiff* is so entitled, the verdict to stand for the *plaintiff*, if not, then to be entered for the *defendants*.

This case was argued at great length in *Hilary* term, by Holroyd, for the *plaintiff*, and Walton, for the *defendants*; and, in the statement annexed to the case, the following points were made, for the more particular consideration of the Court. "As to the effect of the surrender of *Thomas*, Earl of *Strafford*, dated *April* 10, 1732, to the use of his will; Whether it extends to surrender his *uncompounded* as well as his compounded customary tenements? Then as to the effect of the will, Whether the customary tenements comprehended in that surrender are devised by the will of *Thomas*, Earl of *Strafford*, to his eldest daughter, Lady *Ann*, and her first and other sons in tail, &c. or to his three daughters, Lady *Ann*, Lady *Lucy*, and Lady *Harriet*, by the residuary devise. The lessor of the *plaintiff* contends, that the customary tenements are *customary freeholds*, and pass as such by the first of those devises; but that, whether customary freeholds or not, they pass by implication to the eldest daughter, Lady *Ann*, and her first and other sons in tail, taking the whole will together, and particularly the resi-

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duary devise, which devises *all other* the testator's lands, subject to the devises therein aforesaid. The *defendants* insist that the customary tenements are copyholds, and do not pass by the first devise, but pass to the three daughters by the residuary devise:

Arguments for the *plaintiffs* on the first point. The doubt whether the *uncompounded* tenements pass, arises from the latter part of the surrender, describing them as held at a rent to the lord of 4l. 10s. 8½d. in the whole, and uncompounded for. The *defendants* must contend that by the words '*and uncompounded*', it is confined to the tenements compounded for. The *plaintiff* insists on the contrary, that these words are introduced through a false supposition of the testator, and were not intended so to confine the surrender merely to those tenements. Without those words, the surrender would clearly apply to all, and that being the case, a slight mistake in the amount of the rent, and in considering the whole as being *compounded for*, when part were not so, will not prevent the surrender from operating on the whole. As in grants and wills, a mistake in the description of the thing granted or devised, will not vitiate the grant or devise. Thus, in *Blague* v. *Gold*, * on a special verdict:—"*P. Blague* was seised in fee of two houses in *Andover*, one in the tenure of *Hitchcocks*, and the other of *Bincent* and *Note*; the latter being the corner house, but contiguous to the former; and he devised to *C.* in fee, his corner house, in *Andover*, in the tenure of *Bincent* and *Hitchcocks*, upon condition to be new built according to a covenant in a lease made to *B.* This is a good devise of the corner house to *B.* and *Note*; for the corner house is sufficient certainty to pass it without more; and therefore, though the other addition in the tenure of *Bincent* and *Note* be false, yet this shall not vitiate the devise; and the clause 'provided that it be rebuilt according to the covenant in

* *Cro. Car.* 447. 473. *Jo.* 379.

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the lease made to *B.*, shews the intent to pass the house." Here the descriptive part of the surrender comprehends all, and the latter part is not matter of new description, but is merely a false allegation as to what is before sufficiently described, and the amount of the rent clearly ascertains it. So in *Dyer*, 336, a feoffment was made of a house described, 'late of *Richard Cotton*,' whereas the feoffee had bought it of *Thomas Cotton*; yet this misdescription was held not to vitiate. And in the *Vicar's Choral of Lichfield* v. *Eyres*,* there was a grant of 78 acres of glebe, and of all the tithes of 78 acres of glebe land, "all which were in the tenure of *Margaret Peto*;" this was found not to be true, part only being in her possession, yet the grant was held to extend to the whole.

Arguments for the *defendants* as to the same point. The testator having different estates in, and different powers over, the customary estates, he may be supposed to intend to surrender not the whole of them, but only those over which he had a power of devising, and he could never mean to devise for life those over which he had no power himself till after the devisee's, his own eldest son's, decease, without issue male. All surrenders are to be construed strictly as wills, and the true rule of construction is, that were there is sufficient certainty of the thing granted, as by giving it a name, there a subsequent mistake in the name of the tenant, or the number of acres, will not hurt; but where the thing is at first described generally, and afterwards a particular description is added that shall restrain the former part. So in *Broke's Abr.* tit. *Grant*, 92. One grants all his land in *D.* of the gift of *J. S.*; none but that given by *J. S.* shall pass. And so here the particular description rides over and restrains the whole. See also *Fitz. Abr.* tit. *Release*, 11. and 2 *Co.* 33. So in *Wrothesley* v. *Adams*,† a devise of all my lands in the

* Sir *W. Jones*, 435. S. C, *Swift* v. *Eyres*, *Cro. Car.* 548.

† *Plowden*, 191.

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vill *A.* and in one of the *hamlets* therein, was held to pass only the lands in that one hamlet. In *Gascoign* v. *Barker,* * All my (the testator's) freehold and copyhold lands in *Middlesex,* 'which copyholds I have surrendered to the use of my will,' the generality of the former words was held to be restrained to the copyholds which had been actually surrendered, though they would otherwise have passed without a surrender, the devise being to younger children; and in *Willson* v. *Mount,* † on a devise for the benefit of creditors, of all my freeholds and copyholds the copyhold part whereof I have surrendered to the use of my will (the fact being that part were surrendered and part not). The Master of the Rolls, held that these words may be restrictive, unless the intention was clearly the other way.

On the second point, Whether these tenements passed by the devise to Lady *Ann* for life? it was contended for the *plaintiff,* that the *customary* tenements were not copyholds, but *customary freeholds;* they being said to be held not *ad voluntatem domini,* but only by copy of court-roll, and also being part of a manor in *ancient demesne,* and the tenants having the mines and timber. In support of this argument the cases and authorities cited below were referred to.§ And as to the information in 7 *James* I. it was said, that though it states the tenements to be held at the "will of the lord," yet that is not evidence against the tenants; and it appears from the plea and subsequent proceedings, that they were claimed as customary freeholds, for the tenants admit only that they hold

* 3 *Atk.* 8.

† 3 *Ves. jun.* 191.

§ *Co. Cop.* 32. *Co. Lit.* 49, *a.* 59, *b. Burrel* v. *Dod,* 3 *Bos. & Pul.* 382; and see 1 *Law Journal,* 335. *Hughes* v. *Harris, Cro. Car.* 289. 11 *Mod.* 53. *Hill* v. *Bolton,* 2 *Lutw.* 1171. *Rodgers* v. *Bradley, Vent.* 143. 5 *Co.* 84. *Gale* v. *Noble, Carthew,* 432. *Hussey* v. *Grylls, Amb.* 299. *Crowther* v. *Oldfield,* 2 *Ld. Raym.* 1225. *Salk.* 364. 1 *Lutw.* 125.

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"according to the custom of the manor," and not "at the will of the lord," and the decree is only that they shall be held "according to the custom of the manor," and not "at the will of the lord." Besides which, the only question there in dispute was, as to the nature of the fines; and the statute by which the decree is confirmed, contains a saving clause, saving to the parties their former estates. And as to any inference that they were not customary freeholds, which might be drawn from the form of admittance, that being in the words of the lord of the manor, would not conclude the *plaintiff*; and even though they are stated to be copyhold, yet that is not conclusive, because they are so, as being held by copy of court-roll. That, being customary freeholds they would pass under a *devise* of all *freehold* lands, *Greenhill* v. *Greenhill*. * That by the introductory clause of the will the testator clearly intended to dispose of all his estates whatsoever,† and that by the exception in the residuary devise to his three daughters, he evidently supposes that he has disposed of these tenements, and he does not even devise the residue until after the death of himself and his brother without male issue; which also shews that he thought he had disposed of it before.

For the *defendants*, on the same points, it was insisted that even if the tenements were customary freehold, they

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* 2 *Vern.* 679; this was also inferred from the following cases: 9 *Mod.* 68. 10 *Mod.* 518. *Acherley* v. *Vernon*, *Comyn's Rep.* 381. *Haslewood* v. *Pope*, 3 *P. Wms.* 323. *Tendrill* v. *Smith*, 2 *Atk.* 85. *Doe* v. *Allen*, 8 Term Rep. 497. *Goodright* v. *Stocker*, 5 Term Rep. 15. *Ibbetson* v. *Beckwith*, *Forrester*, 157.

† On this head were cited the following cases: *Smith* v. *Coffin*, 2 *H. Bl.* 444. *Doe* v. *Buckner*, 6 Term Rep. 610. *Gulliver* v. *Poyntz*, 3 *Wils.* 143. We omit stating the argument more fully, as most of these cases upon construction of wills, as to the leading points, are well known, and particular arguments on the construction of one, will seldom apply to others.

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were still a tenure in villenage, forfeitable by leasing for more than a year, and only a superior sort of copyhold. But it was insisted that upon the information, 7 King *James* I. they were confessed to be "parcel of the manor," and were therefore *copyhold*. That it was stated in the case "that these tenements were always found and reputed copyhold;" and that the testator must therefore be supposed to have considered them so. That as to the introductory clause of the will, in all the cases cited, there were, besides, other strong proofs of intention, which are wanting here. That as to the cases that, under a devise of "lands" generally, copyholds will pass, they may be admitted; and yet there is no case where, under the words "all freehold lands," copyholds were held to pass; and when the testator means to pass copyholds, he uses proper words in this will to comprehend them. That as to the residuary devise, it contains words large enough to include all which was not given before, and the exception applies only to what is plainly mentioned before. That as to some of the tenements, if they passed under the first devise, the first taker, being himself tenant in tail under a former title, might, by a recovery, destroy all the estates created by the devisor.

Walton declined arguing upon the failure in performing the condition of taking the name of *Wentworth*, because his own client deriving title under a daughter, he could not take advantage of it, the limitation over being to the first and other sons of the *daughter*, who should neglect to take the name.

The case stood over for judgment till this day, when the opinion of the Court was delivered by

Lord Ellenborough, C. J. who, after reading the case, and stating the several points which had been made, concluded that the cases from *Dyer*, *Croke*, and Sir *William Jones*, and others which had been cited for the *plaintiff*, to shew that the surrender included the *uncompounded* as well

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as the *compounded* lands, were all clearly distinguishable from the present; there being in them words sufficient to shew a clear intention to convey the whole described in the first part of the several descriptions; and the other words in which there was a mistake being added in another sentence by way of further explanation. That in some of them the grant was of one particular thing, clearly defined; in which case the addition of another circumstance, which is erroneous, would not vitiate the whole. But here the former description was general and indefinite, and must be restrained by the subsequent words. He referred particularly to the case of *Gascoign* v. *Barker*,* and said that in the case of *Swift* v. *Eyres*,† the distinction was clearly taken, that the words *all which were in the tenure of J. S.* were there a part of a new sentence, and so were not restrictive, though they would be so, when the clause is general and one sentence, and not restrained till the end of the sentence, as in the case 2 *E.* IV. c. 29, *Pl. C.* in the case of *Wrottesley* v. *Adams*. But in this case the words *being of the yearly rent to the lord, in the whole, of* 4*l.* 10*s.* 8½*d. and being compounded for*, were a part of the same sentence, and clearly part of the description. That the latter words, therefore, operated by way of restriction, and confined it only to the tenements compounded for. As to the second question, he observed upon the effect of the information and decree, and also upon the surrender, and the mandamus to be admitted, in all of which the tenements are called copyhold; and said, that although many cases had been cited to shew that where the tenements are not held at the will of the lord, they are not copyhold; yet without going into the question, whether they are strictly so or not, it was sufficient to inquire what the *testator* meant by the words *all his freehold manors, lands, &c.* and it could not be considered that he would enter into the nice distinctions of lawyers on a question of subtlety and intricacy, and make

* 3 *Atk.* 8. † *Cro. Car.* 548; and Sir *W. Jones.*

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a distinction between customary tenements of freehold, held by copy, and common copyholds, particularly since the customary tenements were always demisable by copy of court-roll. That in making devises, testators adopt common terms, and cannot be supposed to make very nice distinctions; that in no other parts of the will had the present testator classed these tenements with freeholds. That where he had given any thing expressly, he had generally used appropriate terms, as in the first charges of 2000*l.* and 200*l.* on the real estate in lieu of dower; that in the residuary clause, where he spoke of freehold and copyhold, he knew how to make the proper distinction between them, and yet excepted only, in general terms, that which he had in general terms given before. That upon this clause, indeed, it was contended for the *plaintiff*, that it was plain he thought he had devised them before, as he intended to devise all his real property, and this residuary clause being only in failure of male issue, itwould not apply to them; but that the answer properly given was, that there could be no intestacy, since the words are sufficient to include the whole; and although introductory words will explain the testator's intention, yet there are no cases that introductory clauses can alter the construction where the testator uses plain words. And more particularly would it be improper to alter the construction of these words, when afterwards, in a certain event, the testator devises all "other his manors, messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, both freehold and copyhold, excepting in the county of *York*," &c. plainly shewing that where he intended to pass copyhold lands, he was able to describe them properly. And he concluded, on the whole, that the Court could not give to the word *freehold* any other than its *ordinary* meaning in the will of a testator who seems clearly to know the meaning of the words he use.

POSTEA TO THE DEFENDANTS.

ANONYMOUS.—*April* 25. 1804

No action will lie at the suit of a father for seducing his daughter, per quod servitium amisit, *where the daughter does not reside in the father's family, and has no intention of returning to it, although she is not residing as a hired servant elsewhere. To support this action, there must be some appearance at least of the relation of master and servant still subsisting between the father and his daughter.*

TOPPING moved for a new trial, in an action for seducing the *plaintiff*'s daughter, in the common form of declaring *per quod servitium amisit,* tried on the Northern circuit in the last assizes, in which there had been a nonsuit, on the ground that the daughter, not being resident with the father, but living with a relation, though not as a servant receiving wages, she could not be considered as a servant to the father, and he could not complain of the loss of her services. ANONYMOUS.

He cited *Gould* v. *Charlton,** tried in 1789, on the Northern circuit, before *Wilson,* J. who held that if the daughter be under age, though she be not resident with the father, yet the action is maintainable. He also cited *Johnson* v. *Mc Adam,*† in which *Wilson,* J. had ruled the same point; but he admitted that the opinion of *Buller,* J. as stated in *Bennett* v. *Allcott,*‡ was certainly against him; and, upon being questioned by THE COURT, he admitted that had it not been for the misfortune which occasioned the action, it was not intended that the *daughter* should ever return to her father's family.

Lord ELLENBOROUGH, C. J. "The case seems clear. There was in this case no service, there were no wages, and there was no intention of returning to the father. In

* MS. † MS. ‡ 2 Term Rep. 166.

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the cases cited, it is true there was no actual residence in the father's family; but the Judge decided them upon the ground, that there the relation of master and servant had never been discontinued.*

RULE NISI REFUSED.

GOULD *versus* S. COLYER, *Gent.* One, &c.—*May* 2.

The statute 39 & 40 Geo. III. *c.* 104, *s.* 5, *(Public local acts) called the London Court of Conscience Act, does not apply 'to persons' merely on account of 'seeking a livelihood' therein, unless they reside there, or do it in some open way, or seek their livelihood there substantially. An attorney, therefore, who has no office or residence in the city, is not within the act, and may be sued in the superior courts.*

GOULD versus COLLYER.

ON a rule to shew cause why, after verdict against the *defendant* for a small debt under 5l. a suggestion should not be entered on the roll, that the *defendant* was within the last *London* court of conscience act, 39 *Geo.* III. c. 104, s. 5, of the public local acts, the *defendant* swore that "before, and at the time of the commencement of the suit, he sought his livelihood in the city of *London*, and carried on the business of an attorney;" but did not go on to say that he resided there.

BARROW, in support of the rule, cited the act whereby it is enacted, that "any person, whether residing within the city of *London* or elsewhere, who shall have any such debt as therein mentioned claimed by him, not exceeding 5l. from any person whomsoever, residing or inhabiting within the city of *London*, or the liberties thereof, or keep-

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* Vide *Postlethwaite* v. *Parkes*, 3 *Bur.* 1878.

ing any house, warehouse, shop, shed, stall, or stand, *or seeking a livelihood,* or trading or dealing *within the same city* or liberties, may cause such debtor to be summoned and proceeded against as therein mentioned; and contended that the words being all in the disjunctive, it was only necessary to shew that the *defendant* "*sought* his livelihood in the city of *London,*" and it was not necessary to add that he resided there.

LAWES, *contrà.*

Lord ELLENBOROUGH, C. J. "Unless it appeared that the *defendant* resided or kept an office for business within the city of *London,* I do not think he is within the act. The words '*seeking a livelihood,*' do not seem to apply to attornies. The persons to whom that clause may be supposed to apply, must seek a livelihood in an open way. It would be sufficient to satisfy this affidavit if the *defendant* went to high Change to look out for clients, but that cannot be within the act."

LE BLANC, J. "We must construe the act with reference to the subject matter, and the persons who fall within the description of persons who seek their livelihood within the city, must be in some way of doing it substantially."

RULE DISCHARGED.

BUTTERFIELD (qui tam.) *versus* WINDLE and Another.

May 4.

To sue out execution, pending a writ of error for delay, the party must state positively an admission that it was brought solely *for delay. It is not sufficient to shew that the* defendant *meant to harass and de-*

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BUTTERFIELD *versus* WINDLE.

lay the plaintiff, *unless it appear also that he acknowledges he has no ground for his writ of error.*

MANLEY moved for leave for the *plaintiff* to take out execution pending a writ of error *apparently* brought for delay. The *plaintiff*, in his affidavit, for the purpose of obtaining the rule, swore that one of the *defendants*, the *plaintiffs* in error, said he would bring a writ of error, and spin the cause out as long as he could, that the *plaintiff* could not get *judgment* for twelve months to come, and that then he would bring another writ of error in the house of Lords.

Lord ELLENBOROUGH C. J. "You do not by this affidavit bring yourself exactly within the rules of the court. For *non constat* that the party may not have some ground for his writ of *error*, and then, however vexatious his conduct may be, yet still he has a right to proceed."

SOMERVILLE *versus* WHITE.—*May* 7.

A writ of error may be sued out before final judgment is signed and it will be a stay of execution.

Semble. "*Where a writ of error is sued out, and the* plaintiff *will not sign judgment till after the return of the writ, in order to avoid the effect of it, and then sues out execution, the Court will set the execution aside.*

SOMERVILLE *versus* WHITE.

GARROW shewed cause against a rule obtained by COMYNS, to shew cause why a writ of *fi. fa.* should not be set aside, and 130*l.* levied thereon, should not be restored to the *defendant*, for irregularity, the writ being sued out after notice of a writ of error. He stated the proceedings, from which it appeared that the *defendant* had pleaded a sham plea to gain time, which being withdrawn, interlocutory judgment was signed, and after-

wards final judgment; but before the execution was sued out, the *plaintiff* had notice of a writ of *error*. On searching, he found that the writ of error was sued out four days before the signing of final judgment. This, he said, was a sort of anticipation that the court would give an erroneous judgment, and was certain evidence that the writ of error was sued out for delay, and therefore the execution was not irregular.

GIBBS, *contrà*, cited *Jdques* v. *Nixon*,* where *Buller*, J. says *obiter*, "As to the practice which has almost universally obtained of suing out a writ of error before judgment signed, it happens in almost all cases that the writ of error is sued out before judgment is actually signed; because, otherwise execution would issue instantly. And the Court have gone so far that where a writ of error is sued out, and the *plaintiff* will not sign judgment till after the return of the writ, in order to avoid the effect of it, and then sues out execution, the court will set the execution aside." And now,

BY THE COURT. "It is never the practice to infer an intention of bringing a writ of error for delay, merely from circumstances. Unless this practice were allowed, writs of error could not safely be brought. For wherever the party is afraid of a writ of error, and the debt is large, he sues out execution instantly after signing judgment, and that without waiting to tax his costs.

RULE ABSOLUTE.

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* 1 Term Rep. 279.

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PINTO *versus* HUTCHINSON.
HUTCHINSON *versus* PINTO.—*May* 12.

A Foreigner *having obtained judgment in an action of* assumpsit, *and the* defendant *therein having a* cross *action* upon the case *pending against the* foreigner, *for damages accruing out of the same transaction, the Court permitted the latter to pay the debt on the former judgment into court, to abide the event of the suit then pending, but to be paid out immediately after the trial, he going to trial immediately.—A motion of the first* impression.

PINTO *versus* HUTCHINSON.

PINTO brought an action against *Hutchinson* on a bill of exchange, and for goods sold and delivered, being the consideration of the bill, namely, a quantity of wine sold to *Hutchinson*, in which action the *defendant* gave a *cognovit* on the 1st of *March*, with a stay of execution till the 30th of *April*; but *Hutchinson*, before that time, brought a cross action upon the case against *Pinto*, for not delivering the full quantity of wine which he had contracted to deliver. These actions were, therefore, connected together, as arising out of the same transaction. *Pinto* having sued out execution, or being entitled to have execution against the *defendant*, *Hutchinson*, and being a foreigner, *Hutchinson* now moved for leave to pay into court the money due on the *cognovit*, and that execution should be staid in the mean time, until the second action should be tried. And this was urged the more on account of *Pinto* being a foreigner, who, if he were *plaintiff*, would be bound to give security for costs, and having once got the money, might quit the kingdom.

THE COURT, after some discussion between HARRISON and ERSKINE, for the opposite parties, though they thought this a motion of the *first impression*, ordered the money to be paid into court to await the trial of the second action, as justice could not be done upon the whole transaction between the parties without this rule; but

at the same time they ordered that the *plaintiff* should proceed to trial immediately, and that if a verdict should be had against him, or a nonsuit, the money should be paid out immediately after the trial was ended.

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WILLIS *versus* the COMMISSIONERS of APPEAL in PRIZE CAUSES.—*April* 23.

A court of prize has original jurisdiction over the prize and the proceeds thereof, and may decree interest against any agent or other person in whose hands it may be, if he made interest or profit thereof, as part of the res, *and, independently of the authority over prize agents given, by the several statutes, to the courts of admiralty. If such agents have not made interest, they should rest their defence upon that point in the prize court below, and this court will not grant prohibition.*

WILLIS *versus* the COMMISSIONERS of APPEAL in Prize Causes.

ON a rule *Nisi* for a prohibition to the commissioners of appeal in *prize causes* to prohibit them from proceeding further against *Willis*, it appeared that an order had been made in a prize cause by the said commissioners upon him, as prize agent, to pay interest on the proceeds of a prize which had come to his hands. The capture was made in *June* 1798, by Captain *West*, of his M.S. the *Tourterelle*, and the prize condemned at *Jamaica* by the *vice-admiralty court there*, and *inter alia*, it was ordered that the prize should be sold by the agents of the captors, and the produce be distributed among them. From this sentence there was an appeal by the claimants, which being allowed, the agent of the *captors*, *B. Waterhouse*, entered into the usual security "to account for and pay over the net proceeds of the goods and specie condemned as the court should thereafter direct, in case the sentence

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should be reversed." That the captors and their agent proceeded regularly in the course of this appeal, that the goods condemned were sold on the 20th of *September*, 1798, pursuant to the statute, and produced 4,552l. 1s. 7d. net. The commissioners on the appeal reversed the original decree of condemnation, and decreed the cargo to be restored, or the value to be paid to the claimant, and *condemned the captors, in interest, from the sale of the cargo.* On the 4th of *August*, 1802, a *monition* was issued by the commissioners against *J. Willis* and *B. Waterhouse*, as the agents of the captor, to "shew cause why they should not pay interest on the said proceeds." On the 14th of *July*, 1803, *Willis* appeared and shewed cause, and, in his suggestion, alleged *inter alia*, that he was not party to the suit and appeal, and was not connected therewith otherwise than as being the general partner in trade with *Waterhouse*, and that the goods became vested immediately from the condemnation, &c. in the captors, and that *Waterhouse*, having collected the proceeds on the sale, continued to hold the same "as an agent or banker usually holds money in his custody, liable to be called for at any moment, and mixed with other monies then also entrusted to him." That no judicial order having been made by any court for laying it out at interest, or otherwise making profit of it, no special investment was made thereof by the captors, or *Waterhouse*, or *Willis*, and no *specific profit* could be set forth or ascertained to be derived therefrom; and although as soon as the decree of restitution was made known to *Waterhouse*, he paid the proceeds to his *majesty's proctor*, &c. and *Willis* never had any power, custody, controul, or management over the proceeds or any part thereof but they remained with *Waterhouse* in *Jamaica*, and *Willis* insisted upon and offered to verify the same before the commissioners; yet they refused to admit the same, and decreed interest to be paid to *Willis* from the time of the sale, &c. The suggestion insisted also, that the commissioners had not jurisdiction,

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GIBBS and STEVEN shewed cause, and contended that the court of appeal had jurisdiction at common law *in rem*, and might decree interest on the proceeds in whosever hands they might be found, and that it must be taken after sentence, that the court proceeded rightly upon evidence of interest being made, and insisted that the authority of the court was not confined by the prize acts—33 *Geo.* III. c. 66, which had been cited when the rule was obtained.

ERSKINE, PARK, and RICHARDSON, in support of the suggestion, contended that though it might be admitted that interest ought to be given against the captors where interest had been made; the court of appeals here had proceeded against one who was not properly before them. That under the prize acts, 33 *Geo.* III. s. 32, the courts of admiralty have only jurisdiction as to the *net proceeds*, which shall be deemed the full *value*; and that clause enacts, that "the *parties appellate*, and their securities shall not be answerable for the value beyond the amount of such proceeds, unless the sale be fraudulent or without due care;" and in the 28th section security is required from the parties to restore the *ship* or *effects*, or *full value* thereof. That interest here could neither be decreed on the ground of punishment for misconduct, since none was proved or suggested, nor as arising out of any *contract*, that being not only out of the jurisdiction of the court, but impossible from the situation of the parties, the appellants and *Willis*, between whom there could be no privity. They also referred to the 48 *Geo.* III. c. 160, s. 50 and 62, a statute subsequent to this transaction, which requires agents to give security in 5000l. for due performance of their trusts, and gives the court power to assign the agents or other persons into whose hands the proceeds should come, at the prayer of either party, to bring in the net proceeds, deducting enough to pay the expences of the appeal, which should be paid into the bank of *England*, for the use of the cause, or be advanced upon securities as the parties might agree; which shews

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that the framer of the act thought the court had no power over the interest in the hands of the agents previous thereto.

Lord ELLENBOROUGH, C. J. "This prohibition is applied for on the supposed ground of a want of jurisdiction to decree interest as against the prize agents. It is clear the court has a right to make a decree *in rem* upon the proceeds of the thing captured, either against the captor or any other person into whose hands they come. And it was agreed that the court may give interest in the case of the captors; but it is said that it cannot be done as against the agents, because they are liable on their security only, for the value of the net proceeds; and even against the captors, it is given only by way of punishment for misconduct. But the question is not here upon considering it as a punishment; in which case I agree that there should have been some proceedings *in pœnam*, but it is in consequence of the agent having made a profit of the original fund, that he is made answerable for that profit as well for the *res* or original fund. Arguing from the practice in courts of law, this is done every day. It is said, however, that there is no evidence of this profit being made. Then this is merely a question of jurisdiction, and we must give credit to the commissioners of the court of appeals for doing that which is right, upon having had sufficient evidence. If it has never been done before, and it is a new proceeding, it is really time, that having jurisdiction over the *res*, they should decree the accessory or interest along with it. Upon principle, it is an enormous incongruity that the captors, who have done nothing to make them liable, except in having made the capture, should be condemned in interest as well as principal, and the agents who have made the actual profit by the possession of it, during a long time, should be liable only for the bare proceeds of the sale. I repeat that we must give credit to the court of admiralty appeal for having done this upon evidence of the parties' having made interest, and it comes at last to this question only—

Whether interest is to be considered as part of the *res*, of which restitution is to be decreed?"

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GROSE, J. concurred in thinking the interest must be considered as part of the proceeds at the time when this order was made, and that its being in the hands of the agent was sufficient to give the court jurisdiction over him.

LAWRENCE, J. "Supposing that the prize agent were not originally liable at common law, then it would be a question upon the several acts of parliament; but this does not arise out of the statutes, but out of the general law and authority of the admiralty court, the interest being a part of the proceeds. The 32d section of 33 *Geo.* III. c. 66, has been cited to shew that he cannot be liable beyond the value at the time of the sale. But I take it, that only means that the party shall only be liable so far considering it as principal. In short that if the *thing* should be fairly sold, he should not at that time be liable for more than the *net proceeds*. But it does not mean that if *afterwards* he makes more of it, he shall not be liable to the full extent. In *Smart* v. *Wolfe*,* BULLER, J. said that if the party had not the proceeds in his hands, he should have pleaded that below. That might have been done also here with respect to the interest. But they do not say they have not made interest of it; on the contrary, they say that when the money is deposited in the hands of the agent, he is only liable as a banker. This is only a negative pregnant, and it is not material whether they have made profit in a regular way as interest, but whether they have made any profit or not. Whatever it be, it is an *accretion* to the proceeds, which is equally liable to the decree as the original thing. If they had not made a profit, the agent might have put his defence upon that issue. I do not consider it as de-

* 3 Term Rep. 323.

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creed by way of punishment, nor as arising out of a contract between the parties; but that it is proved that they have made interest of the money, and that such interest is part of the proceeds. And it must be taken that the commissioners had proof of that fact. If not so, it is rather a question for appeal than for prohibition.

LE BLANC, J. concurred on the topics before urged, and added "whether there was or was not interest in fact made is not the question now; but looking at the proceedings, I am not surprized that the court concluded that the agent had made interest. I consider the interest as composing a part of the proceeds at the time when *Willis* was *admonished* before the court. I cannot think the act of parliament cited (43 *Geo.* III. c. 106) proceeds upon any doubt that the *agent* was liable, as agent, for interest. But, for the better security of the parties, and supposing that it is possible that the agent may become insolvent, it directs that it shall be put into safe hands to accumulate for the use of the right owner."

RULE DISCHARGED.

REX *versus* the Inhabitants of MARTLEY.—*April* 25.

A pauper residing on a cottage and half an acre of land, under a lease for three lives, at 1*s. rent, for which he had given two guineas by way of fine, is not removeable, though he become chargeable. His application for relief is not a consent to be removed.*

REX *versus* the Inhabitants of MARTLEY.

ORDER of two justices for removal of *William Barton* and family from *Doddenham* to *Martley*, both in the county of *Worcester*, confirmed on appeal to the sessions, whereupon, a case being made, it was stated in substance that the pauper's grandfather, on the 25th of *November*, 1754, had taken a lease, to him and his heirs, from the

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dean and chapter of *Worcester*, of a cottage and half an acre of land, in *Doddenham*, for his own life, and two other lives. He resided thereon till his death; it then descended to his son, who devised it by will to his wife, with remainder to the pauper. The pauper, after the death of his father, came to reside with his mother, and, upon his marriage, she demised the premises to him at 1l. 11s. 6d. rent. After the death of the mother, on the 26th of *November*, 1798, the dean and chapter "on the application of the pauper, and on payment by him of a fine of two guineas," granted a new lease, to hold to him and his heirs for three new lives, still in being, at a new rent of *one shilling*. The sessions found that at this time all the lives in the first lease were extinct, the third *cestui que vie* having been absent from the country thirty years without being heard of. The second lease was considered as a new demise, and not a renewal. Previous to the death of the pauper's father he had acquired a settlement in *Martley*. From the time he was possessed of the premises he paid the 2s. 6d. under the first lease, and also the rent of 1s. under the second. He *became chargeable* in *Doddenham*, and was removed to *Martley*, the lease being still in existence.

TOUCHET and PEAKE contended, in support of the settlement, that the new lease being a purchase under 30l. value, the pauper could not gain a settlement thereby under the statute 9 *Geo.* I. c. 7, s. 5; and upon being asked by the court, if there was any case to shew that a man could be removed who was residing on his own, PEAKE contended that the pauper applying for relief, which he could only obtain by means of *removal*, must be taken to give his consent to it, and the ground on which *Foster*, J. argued in the *King* v. *Athrop Ruding*,* namely, that it would be to disseise a man of his freehold, would

* *Burr.* Settlement Cases, 412.

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not apply, for there could be no disseisin without force. Besides which, the argument that it would work a disseisin was rather strange for such a Judge as *Foster*, since, in that case, the pauper only had a copyhold tenement. He cited 2 *Const.* 686, to shew that the justices could not make an order upon the parish of *Martley*, to support the pauper in *Doddington*; but that he must be removed in order to obtain relief.

Lord ELLENBOROUGH, C. J. said that Mr. justice *Foster*, when he said it was against *Magna Charta* to disseise a man of his own *freehold*, did not, when speaking in a case of a copyhold, mean a strict legal disseisin, but spoke by way of similitude, and that the case cited did not deserve what had been said of it; and that it was decided on the authority of Lord *Mansfield* and Mr. Justice *Dennison* also.

LAWRENCE, J. observed that the power of removal was under the 13 & 14 *Car.* II. s. 12, which was never held to extend to persons residing on their own estates; and he also cited the 9 *Geo.* I. c. 7, to shew that though paupers by purchases under 30*l.* value did not gain a settlement, yet they continued irremoveable as before.

Le BLANC, J. "The inconvenience to the pauper does not extend so far as it has been stated. For he may go to his own parish, and there he may obtain relief."

BOTH ORDERS QUASHED.

WALLIS *versus* SMITH, Treasurer of the *West India* Dock Company.—*May* 3.

The 39 Geo. III. *c.* 69, *s.* 185, *which extends the* 24 Geo. II. *c.* 44, *to the lord mayor, aldermen, and justices, under the authority of the same*

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act; and further enacts that no action shall be brought against any person for any thing done in pursuance or under colour of the act until after fourteen days notice, &c. extends to acts done by the West India *Dock company; and therefore an action against the treasurer for wrongs done by the company under colour of the act, he being, in all cases, the nominal* plaintiff *or* defendant *for them under the act, fourteen days notice must be given previous to the action.* Semble, *It is otherwise in actions founded on contracts with the company.*

ACTION on the case against the *defendant*, as treasurer of the *West India* Dock company, for that the *plaintiff* being a broker, and employed by the owners of certain goods in the company's warehouses to examine them and take out the necessary custom-house documents for unshipping them, the company wrongfully caused to be taken and conveyed into their warehouses the said goods and *wrongfully* by their *servants*, &c. prevented the *plaintiff* from entering therein to clear away and deliver the same goods to the owners, whereby, &c. Upon not guilty pleaded, it was proved at the trial before Lord ELLENBOROUGH, C. J. at *Guildhall*, that the directors of the company made an order (as it was stated for their own security) that a person appointed by them should be the only broker allowed to clear away goods, &c. from the warehouses, and there was a verdict for the *plaintiff*. A rule *nisi* was now had for a new trial, on the ground that the act under which the company was incorporated (39 *Geo.* III. c. 69, s. 185,) required that fourteen days notice should be given of any action brought against any person for any thing done by virtue or under colour of the act, it appearing that the company had very general powers, which might probably authorize their appointing a particular person to examine and clear away the goods.

GARROW, PARKE, and WOOD, for the *plaintiff*, insisted that the act did not extend to the present case. The 184th section of the act provides that all actions by the company shall be prosecuted by and in the name of their treasurer, and that all actions against them "for the re-

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covery of any claim or demand, or of any damages occasioned by the said company or for any other cause of action against the company, shall be commenced and prosecuted against the treasurer for the time being, who shall be the nominal *defendant*;" and, by the 185th section, "the statute 24 *Geo.* II. c. 44, for rendering justices of peace more safe in the execution of their office, and for indemnifying constables and others acting in obedience to their warrants, so far as it relates to rendering justices of the peace more safe in the execution of their office, shall extend to the mayor, aldermen, and justices respectively, under the authority of this act. And no action or suit shall be commenced against *any person or persons* for any thing done in pursuance or under colour of this act, until fourteen days notice shall be thereof given, in writing, or after sufficient satisfaction or tender thereof shall have been made to the party grieved, or after three calendar months next ensuing the time when the act or thing shall have been done, for which such action shall have been so brought." They contended, that this latter clause was intended only for the security of the lord mayor and aldermen, and those acting under them, and did not apply to the company. They read the clause, therefore, making it all one sentence, omitting the period after the words *respectively under the authority of this act*, and considering the words *and no action shall be brought against any person*, &c. as only a confirmation and explanation of the foregoing part. And they said that if this clause had been intended to apply to acts done by the company, they would have been named expressly as they had been in the 184th section. That in terms this clause extends to actions for contracts by the company, if they are comprehended in this clause, but that it could never be intended that three months notice should be given to them in actions upon a contract, or that if the party should fail in his action against them, he should be condemned in treble costs. They also put several cases of injuries done by the company to goods shipped outwards, which could not be dis-

covered till after three months from the time when they happened, so that it would operate as a full indemnity to them. But being obliged to admit that the *harbour-master* appointed under the act, and certain persons to whom certain powers were given, in the 179th section, would fall within this clause,

LE BLANC, J. observed that their construction would give the servants of the company an indemnity, and yet not give it to the company under whom they acted.

ERSKINE, GIBBS, and GILES, on the other side, contended that the act clearly applied to the present case; and GIBBS said that there was only two things to be considered; 1st, Whether this were an act done in pursuance of or under colour of the act; and 2dly, Whether it was an act done by any person or persons other than the lord mayor and aldermen.

Lord ELLENBOROUGH, C. J. " This case does not involve much difficulty. The question entirely turns on the 185th section. This, in the first part, enacts ' that the 24 *Geo* II. c. 44, so far as it relates to rendering justices of the peace more safe in the execution of their office, shall extend to the same mayor, aldermen, and justices, under the authority of this act,' &c. It was necessary to extend their powers in this manner, and this is not merely giving them what they had before, which would have been only indemnifying them as far as their jurisdiction and authority then extended, but as there are certain duties cast upon them by this act of parliament, under which they may be called to act out of their former *jurisdiction* as magistrates, this enables them to do so with the like security, which they would have in other cases; but it adds also, that this provision is not to apply to constables. Then the clause proceeds as upon another and different subject, and directs that ' no action shall be commenced against any person or persons for any thing done in pursuance or under colour of this act until 14 days no-

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tice.' These words are very general, and the question is, whether they apply to the company; and since they cannot be sued except through their treasurer, whether he is a *person* within the act? Or whether, as he represents them as an *ens legis*, he can attract to himself, for their benefit, the privilege given to them. Now, the words not confining it to an act done by *him* or *them*, is this an act done in *pursuance or under colour of this act?* These words extend to all actions of trespass and tort, but not to actions of contract, for in *Irving* v. *Wilson*,* the notice to justices was held only to extend to actions of *tort*. Nor is there any repugnance in this clause; for the mayor and aldermen not being privileged out of the city, they are to have the benefit of the 24 *Geo.* II. where they act in pursuance of this act, and *other persons* are to have the benefit of *this* act only. But it has been argued, that many cases may be put where the ground of complaint may not be discovered till after the three months, to which the action is limited. That argument holds to a considerable extent; but if the legislator has made use of words which are plain, it may be a question in some cases whether we may not controul them so as to prevent their working an injury, but we cannot, in this case, deprive the clear words of the act of their fair meaning, because in some other cases it would apply to produce some inconvenience. There could be no doubt in the minds of the parties bringing the action, that the wrong done in this case was under colour of the act, because they have brought it against the treasurer for the body of the company, by which they consider him as standing in their place *under the act*. We, therefore, hold that the act applies to the present case, and that notice ought to have been given."

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* 4 Term Rep. 484. His Lordship also, in the course of the argument for the *defendants*, mentioned the case of *Greenway* v. *Hurd*, 4 Term Rep. 553.

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ERSKINE. "The company now offers to refer the whole case, damages, and costs, in this and other actions, to some indifferent person."

LAWRENCE, J. "This act adopts the 24 *Geo.* II. as far as applies to justices, but not to constables. They are left still exposed to all the dangers of a vexatious prosecution. It is very fit that the act should be revised."*

POTTER and another *versus* BROWN.—*May* 4th.

Assumpsit against the drawer of a bill of exchange drawn in America, *on a merchant in* London, *protested for non-acceptance; plea of bankruptcy, certificate, and discharge thereby in* America. *Held, that the parties being resident in* America *at the making of the bill, this is a good discharge here, if it is so in* America. *For the contract declared upon arises solely in* America. *The engagement of the* drawer *is that he will pay in* America, *if the bill is not accepted in* London.

POTTER *et al. versus* BROWN.

ASSUMPSIT by payee on a bill of exchange, drawn by the *defendant* at *Baltimore*, 2d of *September*, in *America*, on one *Anthony Margin* in *London*, returned protested for *non-acceptance*; with the common money counts. PLEA to the first count setting out an act of congress, of the united states of *America*, of the 2d of *December* 1779, entitled "an act to establish an uniform system of bankruptcy throughout the United States, to take effect after the 1st day of *June*, 1800,"

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* THE COURT, at the same time that they intimated that the powers vested in the company were very extensive and deserved consideration, expressed their approbation of their conduct in thus waiving the advantage of the nonsuit.

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and which directs who may become bankrupts, what shall be acts of bankruptcy, what shall be the powers of the commissioners, and how the certificate shall be obtained; and also directs, "that in case any such bankrupt (having obtained his certificate) shall afterwards be arrested or impleaded, for or on account of any of the said debts, he may appear without bail, and plead the general issue, and give that act and the special matter in evidence, and that the certificate of such bankrupt conforming, and the allowance thereof, according to the directions of that act, shall be allowed to be sufficient evidence, *prima facie*, of the party's being a bankrupt within the meaning of that act, and of the commission; and a verdict shall thereupon pass for the *defendant*, unless the *plaintiff* shall prove that the certificate was obtained unfairly and by fraud." And after certain regulations against fraud, it declares that every such bankrupt shall be discharged from all debts, by him due or owing at the time he became bankrupt, and all which were or might have been proved under the said commission. And that persons having *bona fide* given credit, or taken securites payable at future days, not due at the time of the bankruptcy, shall be admitted to prove their debts as if payable presently. The plea then stated that on the 22d *February* 1802, while the said act was in force, the *defendant* was a merchant residing at *Baltimore*, within the United States of *America*, &c. and that after the cause of action accrued to the *plaintiff*, he became a bankrupt; and also stated the particulars of the petitioning creditor's debt, the commission, and the allowance of his certificate. "And that after the making of the contract after mentioned, in pursuance of which the bill of exchange, in the first count mentioned, was drawn, and also before, and after the time of the *defendant*'s drawing the bill, and receiving the consideration after mentioned for the same; the *plaintiffs* were merchants carrying on trade in co-partnership, as well in the *United States* of *America*, to wit, at *Baltimore* aforesaid, as in *England*, and having a house of trade in

the *United States*, to wit at *Baltimore* aforesaid, where one of the *plaintiffs* then resided, and they so carrying on trade, and having a house of trade in the *United States*, and one of them so residing there as aforesaid, they before the *defendant* became a bankrupt, to wit, on the 2d of *September* 1802, at *Baltimore* aforesaid, contracted with the *defendant* to purchase of him a bill of exchange as in that count mentioned, and then and there delivered to him in payment for the same divers promissory notes, then and there in the said *United States*, made by, &c. and thereupon, before the *defendant* became a bankrupt, to wit, on the 2d of *September* 1801, at *Baltimore*, in the said *United States*, in pursuance of the last mentioned contract, and in consideration of the aforesaid promissory notes so to him delivered as aforesaid, the *defendant* made and drew the said bill of exchange, in the first count mentioned, and delivered the same to the *plaintiffs*, and that the said debt by the said first count attempted to be recovered did not, nor did any part thereof accrue in this realm or elsewhere, than in the said *United States*, in any other or different manner than this, that the said bill of exchange being drawn in the United States as aforesaid, was drawn upon a person in this realm, and was presented for acceptance in this realm, and was refused acceptance in this realm, to wit, at *London*," &c. The plea then stated that the bill was presented and returned protested before the date of the commission, and that before the commencement of this action, to wit, on the 3d day of *March* 1801, at *Baltimore*, in the said *United States*, the *plaintiffs* proved under the said commission as creditors of the *defendant*, taking the benefit of the said commission, the contents of the said bill as a debt to them, and then due and owing from the *defendants*, they then and there being such creditors entitled to prove the same as aforesaid, to wit at, &c. And this the said *defendant* is ready to verify, wherefore, &c.—*General demurrer* and *joinder*.

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T. W. CARR, for the *plaintiffs*, contended that the bankruptcy here pleaded was not a discharge to the present action, and that the ground of action accrued, and the contract was made with a view to be performed in *England*. To establish which he made three points; 1st, that the action accrued immediately upon the refusal to accept, which was in *London*; 2dly, that the right of action followed the person of the creditor; 3dly, that this being a transferrable *chose en action*, drawn on a person in *England*, it transferred the whole cause of action hither, and became like an original contract to pay here, so that the whole cause of action arose out of *America*; and to shew that in such case the bankrupt laws of *America* would be no discharge, he cited *Ballantine* v. *Goulding*,* which he distinguished from this case, upon the above principles, and also *Smith* v. *Buchanan*,† and *Folliot* v. *Ogden*.‡ But the COURT appeared clearly against him.

Lord ELLENBOROUGH, C. J. "The declaration contains no averment that the *defendant* had notice thereof (of the protest) which is an essential averment. Can you attack the plea to shew that they have not brought themselves within the laws of *America*?"

CARR. "The plea states that at the time of the drawing of the bill, the parties resided in *America*, but not at the time of the *non-acceptance*."

Lord ELLENBOROUGH, C. J. "But it will be intended that they contracted, at the place where they are first stated to reside, unless it be shewn that they removed. The whole transaction arises in *America* solely. It is a contract made in *America*, and the *non-performance* is in *America*; the bill was given in *America*, in consideration of bills of exchange by the *plaintiffs*, and they not being accepted and paid, the original consideration is recurred to,

* *Co.* Bank. Law, 515. † 1 *East.* 6. ‡ 1 *H. Blac.* 123.

and it is an *American* transaction throughout. Lord *Mansfield* lays it down as a general principle of law, that what is a discharge by the law of one country, is a discharge by another, as to all contracts made in the former country. If so, there is an end of the whole argument; for this being a good discharge in *America*, it is so here. We recognize the laws of other countries, as far as respects transactions between their subjects as to all conveyances of property.

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CARR then cited *Robinson* v. *Bland*,* in which case the party had drawn a bill of exchange in *France*, for a gaming consideration, on *himself* here in *London*; and it was held, that where the contract is made with a view to be carried into execution in a foreign country, it should be governed by the law of that country; but if it is to be carried into execution here, it must be governed by our laws.

LAWRENCE, J. "Then the question comes to this point—whether or not the contract declared upon, is a contract to be performed in *America*. Now is it not a contract that if the *drawee* does not accept the bill in *London*, the *drawer* will pay the money in *Amercia*?"

JUDGMENT FOR THE DEFENDANT.

ANONYMOUS.—*May 5th.*

Semble. *If a trial be over in the afternoon, and a witness stay in the town till eleven o'clock the next morning, his home being distant only twelve miles, his subpœna is no protection to him from arrest in the town.*

ON motion to stay the proceedings against *defendant*, he having been arrested while returning home, under

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* 2 *Burr.* 1077.

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the protection of a *subpœna*; it appeared that he lived only twelve miles from the place where the trial was had; that it was over in the afternoon; that on the next morning he continued in the town, and was preparing to go home; and at twelve o'clock he was arrested. On the 19th of *April* last, the attorney for the *defendant* wrote a letter, offering to give a *cognovit*.

Lord ELLENBOROUGH, C. J. "Taking it at eleven o'clock, which is between ten and twelve, as there is some doubt as to the time of the arrest, I think that is high time for the *defendant* to go home. At least, the letter is an acknowledgment, that when it was written, the parties did not think there was sufficient ground for an application to the court.

N. G. CLARKE, for the *plaintiff*; HOVELL, for the *defendant*.

EASTLAND *versus* FORRESTER.—*May* 11.

In a case on the annuity act, the court enlarged a rule for the parties in the mean time to bring an action on the bond, and the defendant *to take issue on the payment of the* consideration *in the* very words of the act, *in order to raise the question whether it is necessary to state in the memorial the actual hand by which the money is paid.*

EASTLAND *versus* FORRESTER.

ON motion in an annuity case to shew cause why the judgment entered upon a warrant of attorney should not be delivered up to be cancelled, the objection was, that the payment of the consideration was stated in the memorial to be made by the *plaintiff*, whereas the *defendant* swore that "the said sum of 300l." the consideration of an annuity of 50l. per annum, "was not paid by the said *plaintiff*, nor was she present at the time;" and "that the money was actually paid by *Thomas Rountrell* for her; and that all the parties were still living."

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EASTLAND versus FORRESTER.

WOOD, for the *plaintiffs*, shewed cause, and stated the affidavit of *Rountrell* and one *Hardy*, who were agents in the transaction, but could not say whether the *plaintiff* was present or not. The annuity was granted in 1793. The money was paid regularly till *July* 1796, when there being some arrears due, a *ffi. ffa.* was issued, and execution had. He therefore contended that the *defendant* ought to have made his application to set aside the annuity sooner, and cited *ex parte Maxwell*,* in which Lord *Kenyon* says that there ought to be some rule laid down for such applications, analogous to the statute of limitations.

ABBOTT, *contrà*, contended that the cases in which it has been held that the party has applied too late, were only where the grantee of the annuity was dead, or the persons who managed the transaction were dead. But that the question here could only be, whether Mrs. *Eastland*, the grantee of the annuity, was present at the time of the granting of the annuity and executing the deeds, and under the present circumstances the length of time could be no ground for refusing the application. He added that Mrs. *Eastland*, the grantee, had made no affidavit.

GROSE, J. "The presumption is that after so many years acquiescence the money was paid as stated."

Lord ELLENBOROUGH, C. J.—*to Abbott*—"Have you any objection to take an issue, on the fact of payment, in the words of the act of parliament (not as paid by advancement, for or on behalf of Mrs. *Eastland*, but in the *very words* of the act) and then you may have the question properly raised as to the necessity of stating in the memorial the actual hand by whom the money is paid; in the mean time, this rule to be enlarged for the party to bring an action on the bond? This being assented to,

THE RULE WAS ENLARGED ACCORDINGLY.

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ANONYMOUS.—*May* 12.

On motions to set aside awards where there is no cause pending, it is not necessary that the affidavits, on shewing cause, should be entitled with the christian and sur-names of the parties, although the rule is generally drawn up with the names of the parties, as if there was a cause pending.

ANONYMOUS. ON a rule to shew cause why an award should not be set aside, objection was taken that the affidavits were wrongly entitled, being only in the surnames of the parties without their christian names,

THE COURT held, that although in an action it would be necessary to state the christian names, yet, where there is no cause actually pending, it is not necessary; notwithstanding it is usual to make out the rule in the names of the parties to the bonds of arbitration, as if they were parties in a cause.*

REX *versus* DE MANNEVILLE.—*May* 12.

Habeas Corpus. *Application to take a child born in this country out of the custody of the father, on the ground that he was an alien, and liable to be sent out of the country under the provisions of the alien act. The court refused the application, on the ground that there was no evidence that the child was in danger of being ill treated, or that the father intended to take the child out of the country, and that he had* primâ facie *the legal right to the custody of the child.*

REX *versus* DE MANNEVILLE. THIS was an *habeas corpus* to bring up the body of the infant child of the *defendant*, in order to be delivered over to the *mother*, the wife of the *defendant*, living apart from him, at whose application the writ was obtained. The child was only eight months old, and when the writ

* It seems they need not be entitled.

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REX versus DE MANNEVILLE.

was obtained, it was stated that the father, who was an emigrant, was about to remove it out of the kingdom. The mother had a considerable fortune, which was settled upon herself, and in consequence of some family disputes the father had taken the child by force from the nurse and carried it away in a chariot, half undressed, in a cold night. In order to get access to the child, he had broken into the nurse's room armed with a pistol.

TOPPING, in shewing cause, cited a case before Lord *Mansfield*, MS. *Rex* v. *Lytton*, in 1775. That was a *habeas corpus* to bring up the body of the daughter of Mr. *Lytton*, at the application of the mother, she being taken away from school by the father. The parties were separated by agreement, which was afterwards made a rule of court. The first application was to Lord *Mansfield*, at *Guildhall*; but the parties afterwards came before this court in 1781. If it had not been made a rule of court, the court said they could have no jurisdiction; and on a subsequent day, it was said that the court could not at any age take the child from the father; but the father having bound himself by articles to let the mother have access to the child, it was ordered that if the father chose to take her home, the *access* by the mother must be provided for. He then stated that there was nothing in the affidavits filed, on the part of the mother, to shew that it was the intention of the father, in the present case, to take the child out of the country, although that had been stated as a ground for the *habeas corpus*, when it was first moved for.

ERSKINE, GARROW, and GIBBS, being called upon to shew some ground for the application to take the child from the father, observed, that in *Lytton*'s case, the parties were all *British subjects*, and the child was at school. That Mr. De *Manneville* was an alien enemy, and might be removed out of the kingdom by the authority of government, under the alien act.

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REX *versus* DE MANNEVILLE.

Lord ELLENBOROUGH, C. J. "It does not appear that there is any reasonable ground to apprehend that he is going to take her out of the country. If you can shew that he is about to remove one of his majesty's subjects into the dominions of a foreign enemy that will raise an important question. Or, if the parties give us by their consent, a voluntary jurisdiction, that is quite a different thing. If the liberty of a British subject was in danger, then we might interfere.

GARROW. "We can shew an intention of taking her out of the kingdom only from circumstantial evidence. There are passages in the affidavits, shewing that he threatened to take the mother to *France*, but not any directly as to the child."

Lord ELLENBOROUGH, C. J. "That is only evidence of *sævitia* against the wife, which may lay a foundation for an application to another court. The utmost ground now laid before us is, that because he hates the mother he will hate the child. If there was any thing stated that the child is in danger of being ill treated, we might grant the custody to some other person; but, otherwise, the father is entitled to the custody of his child.

LAWRENCE, J. then referred to the case of Sir *William Murray*, where the child was five years old, and Lord *Kenyon* said that the father was entitled to the legal custody of the child.

THE CHILD WAS REMANDED TO THE CUSTODY OF THE FATHER.

APPLETON *versus* BINKS.—*May* 8th. 1804.

In articles of agreement under seal by B. *describing him as agent for* R., B. *covenants for himself, &c. that* R. *shall accept conveyances, and pay the purchase-money thereon: this is a* personal *covenant by* B., *notwithstanding he is named as* agent, *and covenants in the deed,* on the part and behalf of R.

Obiter. *The party who demurs, should not only state his points, intended to be argued, in the margin of the paper books which he delivers, but should also leave a copy of them with the two other Judges.*

APPLETON *versus* BINKS.

DECLARATION in covenant, on articles of agreement, between the *plaintiff* and the *defendant*, by the name and description of *T. Binks*, of &c. for and on the behalf of the Right Honourable Lord Viscount *Rokeby*, whereby, in consideration of 6000l. paid by Lord *R.*, the *plaintiff* covenanted, on or before a certain day, to convey certain premises in *Yorkshire* to Lord *R.* in fee. In consideration whereof, the *defendant*, for himself, his heirs, executors, and administrators, did thereby covenant with the *plaintiff*, that Lord V. *R.* his heirs or assigns, should pay to the *plaintiff* 6000l. at the time of sealing and delivering the conveyances, &c. The *plaintiff* then assigned a breach, that Lord *Rokeby* had refused to pay, &c. whereof the *defendant* had notice.—*General demurrer* and *joinder*.

W. JACKSON for the *defendant*, stated two points to be argued; 1st, that the deed could not be made by the *defendant* as an agent; 2dly, that as he covenanted not for himself but for and on the behalf of another person, no action would lie to charge him personally.*

* The court in this case complained, as in some others, that the points to be argued were omitted to be stated in some of the paper

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APPLETON *versus* BINKS.

Lord ELLENBOROUGH, C. J. "Do you mean to say that if a person covenant for *himself, his heirs, executors, administrators, and assigns,* for another person, he does not bind himself? A man may covenant that another shall go to *Rome.*"

Finding that the court thought this in terms a personal covenant, that another person should do a certain act, the counsel declined arguing, and there was

JUDGMENT FOR THE PLAINTIFF.

NADEN *versus* PATEN and Another.—*May* 7.

If two or more defendants *are charged in execution on a joint judgment, the discharge of one of them under the lord's act, not opposed by the* plaintiff, *is no ground for an application to discharge the other.*

NADEN *versus* PATEN.

LITTLEDALE moved to discharge one of the *defendants* out of custody upon a judgment against them jointly. Both the *defendants* had applied to be discharged under the lord's act; the *plaintiff* permitted one to be discharged, and opposed the other at the last *Lancaster* assizes. He cited *Clarke* v. *Clements.** He observed, however, that in that case the *plaintiff* had himself voluntarily assented to the discharge of the one *defendant* while the present discharge was under the lord's act by opera-

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paper books. In the demurrer books, made up by the *defendant* they were stated; and, LAWRENCE, J. observed that the party who objects to the pleadings and makes the points, should leave a copy of them with the two other Judges, to whom he does not deliver paper books.

* 6 Term Rep. 525.

tion of law. But as the *plaintiff* let one out of prison and took an assignment of his effects, he said it was a *virtual* assent.

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NADEN versus PATEN.

THE COURT, on the distinction suggested by LITTLEDALE,

REFUSED TO GRANT A RULE NISI.

DOE on the Demise of JANE SHEWEN (Widow) *versus* WROOTS and Others.—*May* 4

On a conditional surrender of copyhold lands, by way of mortgage, the legal estate remains in the mortgagor until the admission of the mortgagee, and will not pass by the will of the mortgagor, or his heirs, without surrender to the use of the will.

DOE dem. SHEWEN versus WROOTS.

EJECTMENT for a moiety of copyhold tenements, &c. in *Sutton St. Mary, Sutton St. Nicholas,* and *Sutton St. James,* in the manor of *Sutton Holland* and *Gedney,* in the manor of *Gedney Pawlett,* in the county of *Lincoln,* tried at the Lent assizes, 1803, and a verdict for the *plaintiff,* and the following case reserved:

At a general court baron holden for the manor of *Sutton Holland,* on the 22d of *May,* 1766, *Anthony Jones,* esq. was admitted as only brother and heir at law of *Richard Jones,* esq. deceased, tenant to five messuages and an hundred and one acres, three roods, nine perches of land, lying in the *three Suttons,* holden of the said manor by copy of court-roll to hold to the said *A. Jones,* his heirs and assigns for ever, according to the custom of the said manor. At a special court baron holden for the said manor, on the 10th of *February,* 1767, *A. Jones* duly surrendered the said messuages and lands to the use of *T. Alderson,* esq. his heirs, and assigns, conditioned to be void on repayment of the principal mortgage sum of 1000l. with

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Dox dem. Shewen versus Wroots.

interest, on the 16th of *June* then next. Afterwards at the same court, *A. Jones* surrendered the said messuages, lands, &c. to the use of his will. *T. Alderson* was never admitted on the above conditional surrender, but *A. Jones* continued in possession of the said estates and receipt of the rents and profits until his death, and died intestate, leaving *Jane Jones*, his sister and heir at law, who was, at a court holden for the manor, on the 4th of *October*, duly admitted to the said estates, to hold to her heirs, &c. On the 2d day of *October*, 1770, *T. Alderson* duly acknowledged satisfaction on the above conditional surrender, which acknowledgment was enrolled at the said court on the 23d of *May*, 1771; on the 10th of *October*, 1770, *Jane Jones* duly surrendered all her said messuages, lands, &c. to the use of certain persons, the executors of *W. Langley*, and their heirs, &c. upon condition to be void on repayment to them of 4000*l.* with interest on the 16th day of *April* following, which surrender was duly presented on the 23d of *May*, 1771; and at a court then held the same day, *Jane Jones* surrendered all her said messuages, lands, &c. to the use of her will. *Langley*'s executors were never admitted on the above conditional surrender, but *Jane Jones* continued in possession of the said estates and receipt of the rents and profits until her death, and she died intestate, leaving *Gryffyd Price*, esq. her heir; who, at a court holden on the 31st of *May*, 1787, was admitted tenant. *Gryffyd Price*, by a codicil to his will, duly executed, and dated 17th of *April*, 1787, charged the above copyholds with an annuity of 200*l.* to his wife for life, and subject thereto, he devised all the said real estates so descended, and the trust and equity of redemption of such parts thereof as were then in mortgage, or wherein he stood seised of an equitable estate only, of what nature or kind soever, unto his cousin, *John Lewellyn*, in fee, and afterwards died, leaving the said *J. Lewellyn* and *Jane Shewen*, the lessor of the *plaintiff*, his cousins and heirs at law. At a manor court, holden on the 27th of *June*, 1788, *John Lewellyn*, was admitted under the said codicil of

1804.

Doe dem. Sherwin versus Watson.

Gryffyd Price, to the above messuages and lands, to hold to him, his heirs, and assigns. At a manor court, holden on the 19th of *May*, 1796, was enrolled an acknowledgment of satisfaction dated the 9th of *April*, 1796, from the surviving executor of *W. Langley* and from *W. L.* his son and residuary legatee, on the above surrender made the 10th of *October* 1770. In the 28 *Geo.* III. an act passed for dividing and inclosing the common of *Long Sutton*, comprising the *three Suttons*; and the commissioners, by their award, 9th of *January*, 1790, allotted to *J. Lewellyn*, in respect of the above copyhold messuages, and in lieu of the rights of common, seventy-eight acres, three roods, nineteen perches of land in *Sutton St. Mary*. The act contains the usual clause that the commissioners are not to determine on titles. At a general court baron for the manor of *Gedney Pawlett*, 1st of *October*, 1789, *Jane*, wife of the Reverend *A. Jones*, clerk, was admitted as daughter and heir of *Jane Griffith*, deceased, to ten acres of land in *Gedney*, to hold to her heirs and assigns according, &c. And at the same court was presented a surrender made by *A. Jones* and *Jane* his wife, 27th of *July*, then last, of the same to the use of them, for their lives, and the life of the survivor, remainder to the heirs of their two bodies, remainder to the right heirs of *A. Jones*; and *A. Jones* and *Jane* his wife were thereupon admitted tenants, on the above surrender, to the said land. On their deaths the land descended to *Richard Jones*, their eldest son; and on his death, without issue, to his only brother *Anthony Jones*; and on his death, without issue, to his only sister *Jane Jones*; and on her death, without issue, to *Gryffyd Price*, esq. her heir at law. But neither of them were admitted thereto. By an *indenture*, dated the 10th of *October*, 1770, between the above named *T. Alderson*, of the first part; the said *J. Jones*, spinster, of the second part; and the executors of *W. Langley* of the third part, reciting the mortgage for 1000l. from *A. Jones* to *T. Alderson*, dated 15th and 16th of *January*, 1767, of the freehold estates of *A. Jones* in *Sutton St. Mary*, *Sutton* and *Gedney* aforesaid; and which indenture of the 10th of *Octo-*

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Dos dem. Shewen versus Woods.

ber, 1770, was an assignment and confirmation of the said mortgage, and made for securing 4000l. and interest to the executors of *W. Langley*, and wherein is a covenant from *Jane Jones* that for the better securing the payment of the said 4000l. and interest, she would immediately surrender all the copyhold premises before mentioned to the use of the said executors, their heirs and assigns, redeemable on payment of the 4000l. and interest; but no surrender was made by *Jane Jones* in pursuance of this covenant. At a court holden for the manor of *Gedney Pawlett* the 31st of *March*, 1796, *John Lewellyn* was admitted, under the codicil of *G. Price*, to the said 10 acres in *Gedney*, to hold to him in fee; and on the 30th of *April*, 1796, he surrendered all the said copyholds in *Long Sutton*, &c. as well the old estates as the new allotments, and also the said lands in *Gedney*, in different parcels, to the *defendants*, who have been duly admitted, and are now in possession thereof.

Question.—Whether the lessor of the *plaintiff* is entitled to recover one moiety of the copyhold estates in *Long Sutton, Sutton St. Mary, Sutton St. Nicholas, Sutton St. James*, and *Gedney*, or either of them, as one of the heirs at law of *Gryffyd Price*, the same not having been surrendered by the said *Gryffyd Price* to the use of his will?

Balguy, for the *plaintiffs*. "The estate of *Gryffyd Price*, in the premises, was not an *equitable*, but a *legal* estate, and he having made no surrender to the uses of his will, that legal estate would not pass by it. For it is clear that wherever a person has legal seisin of copyhold lands, and appoints the uses of the lands by something which he calls a will, he must surrender to the uses of that will." *Coke's Copyholder*, p. 30.

Reader, *contrà*, (in answer to some observations from the court.) "After the surrender of the surrenderor, the legal estate is in him, until the title is completed by the admission of the surrenderee; but yet, though the sur-

renderor has the legal estate, he has no beneficial alienable estate."

Lawrence, J. "That only makes him a trustee; but still he has the legal estate."

Balguy then cited *Floyer* v. *Aldridge* and *Willis*, 20th *November*, 1777, MS. before Sir *T. Sewell*, Master of the Rolls—"In 1772, the testator, in that case, mortgaged copyhold lands. The mortgagee was not admitted, and the money was not paid at the time. The testator made his will in 1774; he devised the estate without making a surrender; he died in 1775. The *devisee* filed a bill against the heir at law. Sir *Thomas Sewell* dismissed the bill, saying 'that if the mortgagee had not the legal estate, there was no equity of redemption.' Before admission, the estate remains in the surrenderor, and here all remains in the mortgagor, and equity will not assist a volunteer against the heir." He also cited *Perry* v. *Whitehead*,* as on this very point; and in that case, he said, that the counsel did not make the point that a surrender was not necessary; but pressed the argument that it might be supplied by equity in favour of great grandchildren; and in *Kennebel* v. *Scrafton*† it was held, that there must be a surrender by a *mortgagor* to the use of his will.

Reader, *contrà*. "The notion of those who have advised the *defendant*‡ is this, that although the legal estate remains in the surrenderor till the admission of the surrenderee, and the land remains in the possession of the surrenderor, yet he can make no disposition of it at all without satisfaction acknowledged, and is only a trustee; but if the surrenderee had been admitted, that admission would have reference to the surrender, and would be sufficient

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* 6 *Ves.* jun. 544. † 8 *Ves.* jun. 30.

‡ He seemed to think the cases cited were strongly against him.

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Doe dem. SHEWEN versus WROOTS.

to support the estate made by him in the mean time. But Lord *Coke* states that the surrender binds the lands, and therefore there may be a question whether after one surrender he could make another. At any rate he could only make a surrender to the use of his will. That, therefore, as to all but the lord, the mortgagor had only an equitable interest which might pass without a surrender."

Lord ELLENBOROUGH, C. J. "This court cannot make a surrender to the use of the will; we are here upon the legal estate, and cannot look to the equity. The heir at law has the legal estate."

READER. "Having no beneficial interest in him, and being a mere trustee for the surrenderee, the legal estate descended for the benefit of *cestui que trust*, and then he cannot set it up against his *cestui que trust*."

Lord ELLENBOROUGH, C. J. "That is going back to a doctrine which has been for some time repudiated."

READER, upon this, observed, that in *Doe* dem. *Staples*,* to which case he supposed his lordship alluded, there was a beneficial interest in the trustee.

BUT THE COURT being clear that the legal estate could not pass for want of a surrender to the use of the will, there was

JUDGMENT FOR THE PLAINTIFF.

BONNER *versus* CHARLTON.—*May* 4.

By an order of Nisi Prius, *a verdict was taken for* 30*l. and* 40*l. costs, subject to arbitration, and the costs of the court were to abide the event*

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* 2 Term Rep. 684.

of the arbitration, and a verdict was to be entered for such sum only, if any, as should be found to be due. The arbitrators awarded 70*l. to be due: Held, that the* plaintiff *could not, on this award, recover either the* 70*l. or the* 30*l. For the arbitrators had no power to award more than* 30*l. and it is probable they might not have awarded even* 30*l. had they not taken something into their consideration which they ought not to have done.* Semble. *If the arbitrators had awarded the* 30*l., distinctly, according to their authority, and added an adjudication that* 40*l. more was still due, the court might have held the award good in part.—Q. Whether the court, upon motion, will permit the* plaintiff *to have execution for* 30*l. costs?*

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BONNER *versus* CHARLTON.

ASSUMPSIT for 70*l.* upon an award made under an order of *nisi prius*, and afterwards made a rule of court, together with 73*l.* for the costs in the cause. This case was tried, last summer assizes at *Newcastle*, before Mr. Baron THOMPSON, and there was a verdict for the *plaintiff* for 143*l.* subject to the opinion of the court, on a case which stated in substance as follows:—That by an order of reference made at *nisi prius*, it was ordered "that there should be a verdict for the *plaintiff*, 30*l.* damages and 40*s.* costs, subject to the award of three persons, to whom all matters in difference were referred; and that the costs of the cause should abide the event of the award, and the costs of the arbitration be in the discretion of the arbitrators, who might direct by, and to whom, and in what manner the same should be paid; and that a verdict should be entered for such sum only, if any thing, as the said arbitrators should find to be due. The arbitrators afterwards and in due time made their award, and adjudged that there was due from the *defendant* 70*l.* and awarded the *defendant* to pay the same, and that the costs of the award should be borne equally; and that the *defendant* should pay 5*l.* 5*s.* to the *plaintiff*, being a moiety of the same costs, and that the *plaintiff* should pay the costs of the arbitration. The costs of the cause were taxed at 73*l.* The *defendant* paid 5*l.* 5*s.* into court, which the counsel for the *plaintiff* contended was an admission of the order of *nisi prius*, and the award; but there was

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not any other proof of any promise by the *defendant* to pay the 70l. The question for the opinion of the court was—Whether the *plaintiff* was entitled to recover any, and what sum?

The case being opened, Lord ELLENBOROUGH, C.J. said "The party has a right only to have the damages liquidated by the award as to the 30l. The arbitrators notwithstanding make it 70l. and award costs: this is an excess of their authority. The award is bad, and it can never be supposed that the payment of 5l. into court can give them a power over the 70l."

RICHARDSON, for the *plaintiff*. "Admitting that the arbitrators have exceeded their authority in giving the award for 70l. yet still the *plaintiff* must be entitled to his 30l."

Lord ELLENBOROUGH, C. J. "If they were distinct things, and you could sever them, I would hold it to be good; but have you any case to shew that we can do so where they are not distinct? if they had awarded 30l. and then 70l. *ultrà* 'provided we the arbitrators have authority,' I might have held the award good."

RICHARDSON then contended that this award was, in effect, the same thing.

Lord ELLENBOROUGH, C. J. "Suppose the damages in an action are laid at 200l. and the jury find a verdict for 300l. would not that be error; and could the court of error cut it down to 300l.?

RICHARDSON was desirous that the case might stand over, and pressed the court with the hardship upon the parties.

Lord ELLENBOROUGH, C. J. "The arbitrators had a limited jurisdiction to assess the damages as to 30l. only, and they could not exceed it. This limitation to their

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authority is like the case of damages laid in a declaration which are the extreme of what the jury can give, and if *they* exceed that amount in their verdict, and the party does not remit it, the court cannot cut it down. We have nothing here to give us information as to the *proper* sum due, and we cannot take upon us to direct or controul the arbitrators now. They might say that unless they applied certain principles which induced them to give 70l. they should have said that not even 30l. ought to have been awarded. And we can now only say, that the arbitrators having exceeded their authority, we cannot make an award for them."

GROSE, J. mentioned that an application was made in this very cause to sue out execution for the 70l. which was refused. [See *Law Journal*, vol. i. p. 343]

LAWRENCE, J. "If this had been an award divisible into two parts, we might have said it was good for the one and bad for the other. At present I do not know that the arbitrators did not take some matters into consideration which they had no power over at all, and that if they had not done so, they might not have said that the 30l. is not due. If there had been a motion on the ground that the arbitrators by mistake had awarded 70l. when they had only power over the 30l. we might probably have helped the *plaintiff*. But the former application was not upon that ground, but was such that the court was obliged to refuse it, because they had not power to grant it."

LE BLANC, J. "No action could be sustained upon this award. There is no *assumpsit* implied, on the part of the *defendant*, beyond the 30l. For he consents only to a verdict for that sum, to be moulded by the arbitrator; therefore, on that ground alone, the action could not be sustained.*

JUDGMENT FOR THE DEFENDANT.

* The court seemed to blame the *plaintiff* for bringing an action after failing in the former application; and HALL, *amicus curiæ*,

1804. BOLTON *versus* GLADSTONE.—*May* 9.

A sentence of a foreign court, after reciting that having seen the verbal process of the capture of the ship, carrying Danish colours, and having examined the papers, and considering that the ship's built was not known, and that the transfer thereof to a neutral subject was made since the war, and that the mate and three officers were naturalized subjects, only since the war, decreed the vessel to be good prize according to the ordinances of 1744, *which require some document to be produced of the transfer of a ship, being enemy's built, before the war, and that the owners or masters shall be naturalized subjects of a neutral power before the war, and direct that all foreign vessels shall be good prize when the merchant, supercargo, clerk, or marine officer on board, shall be an enemy's subject: Held, this is conclusive, that the ship is not neutral under a warranty that the ship is Danish.*

BOLTON *versus* GLADSTONE.

ACTION upon a policy of insurance on the ship *Orholme* and cargo, warranted *Danish*, at and from the island of *St. Thomas* to the coast of *Africa*, and from thence to *Surinam*, &c.; averring interest in *James Hazel* & Co. who, during the time of the insurance and loss, were and still are *Danish* subjects, and that the ship and cargo were *Danish*; loss by capture. Plea, the general issue. At the trial at *Guildhall* a special verdict was found. The case turned upon the warranty of neutrality, and the effect of a foreign sentence, as to which the facts were found in substance as follows:

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stated that when he moved on a former occasion, he understood the court to say that the parties should be left to proceed on their award. But in the report of it in this work it is not so stated.

Afterwards, in the Trinity Term, *June* 14, PARKE, for the *plaintiff*, moved that the *plaintiff* might be permitted to take out execution for 30*l.* and the costs of the cause, and produced an affidavit of the arbitrators, stating that they took into consideration nothing but what was litigated in the original cause, and that they thought the *plaintiff* had sustained damage to more than 30*l.*; a rule to shew cause was therefore granted.

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The ship *Oxholme*, during all the time, was a *Danish* ship, and the property of the said *J. H.* &c. as was also the *cargo*, and the said *J. H.* &c. were, during all the time aforesaid, subjects of the king of *Denmark*, residing and domiciliated at the *Danish* island of *St. Thomas*, and interested therein to the amount insured. The ship, during the whole time of her voyage and until the capture, had on board, together with all other papers and documents usually carried by *Danish* ships, to shew that she was a *Danish* ship, a Latin pass, a Mediterranean pass, a bill of sale, a muster-roll, a measure brief, a certificate of property, and every other document generally carried by *Danish* ships. The first and second mate and other officers and crew were *Danes* and *Swedes*, except one man, who was the only subject of a nation hostile to *France*. It then stated the capture by the *French*, and her subsequent condemnation at the *French* island of *Senegal*. The material part of the sentence was as follows :—" Having seen the verbal process of the capture of the said ship *Oxholme*, carrying *Danish* colours, &c. having examined and compared all the instruments and papers relating to the said ship, particularly two muster-rolls, the one in the *Danish* language, the other in the *English* language, and the bill of sale of the said ship, dated 24th of *May*, 1796, signed *J. H. J. Plewsher* ; considering that the vessel, of what built unknown, was sold to a subject of a neutral power only since the declaration of the present war ; that the bill of sale makes no mention of her place of built, or of her original owner ; that the mate and the third officer were naturalized *Danes* only since the present war ; and the greater part of the white men of the crew are subjects of hostile powers; I decree the said vessel, the *Oxholme*, to be good and lawful prize, conformably to the 10th, 11th, and 12th articles of the regulations concerning prizes of the 21st of *October*, 1744, which are thus worded: " Every vessel of enemy's built, or which shall have been owned by an enemy, shall not be deemed to be neutral or belonging to an ally, if there be not found on board some authentic instruments certified by public officers who may

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ascertain the date of them, which prove that the sale or transfer thereof was made to some one of the subjects of allied or neutral powers before the declaration of war," &c. "No respect shall be paid to passports granted by neutral or allied powers to the owners or masters of vessels, who are subjects of hostile states, if they were not naturalized before the present war." "All foreign vessels shall be lawful prize, on board of which there shall be a supercargo, merchant, clerk, or marine officer of any of his Majesty's enemies, or of which the crew shall consist more than in the proportion of one-third of seamen who are subjects of hostile states." Accordingly, I decree the said vessel, the *Oxholme*, to be sold in the usual form, and the proceeds to be delivered to whom of right they belong. Done, &c.

This case was argued by JENNINGS, for the *plaintiff*, and CASSELS, for the *defendant*, when the court took time to consider of the case, and now judgment was delivered in effect, as follows, by

Lord ELLENBOROUGH, C. J. "Since the judgment of the House of Lords in *Lothian* v. *Henderson*,* we must assume that all sentences of foreign courts, of competent jurisdiction, are to be received here as conclusive evidence upon every subject within their jurisdiction, on which they have *professed* to decide, and which they actually decide. The question on which the prize-court of *Senegal* appears to have decided, they were competent to, and it must follow that their *sentence* will be conclusive as to what they have decided and taken into their consideration. It remains only to inquire whether the court have so decided in this case, on the point of neutrality. Now, in every part of the sentence, it is stated as a litigated point, whether the ship is *neutral*—It proceeds to state, first, that the ship *Oxenholme* carries *Danish* colours, purporting, therefore, to be a ship of that nation. To try the truth of this, it states the nature of her papers. It says, that

* 3 *Bos.* and *Pull.* 499.

he bill of sale was made in time of war, and is therefore ispicious: that the officers and crew do not appear to e properly formed, according to the ordinances; that he mate and third officer were naturalized *Danes* only ince the commencement of the war; and that great part of the white men of the crew were enemies' subjects. Then the sentence states the ordinances, that a ship should e considered as an enemy if it be enemy's built and have ot a bill of sale to prove it to have been transferred before the war. Looking, indeed, at the whole of the sentence, it is impossible not to see that the court of prize at *Senegal* canvassed and discussed, whether the vessel was neutral, and that taking all the circumstances, mentioned in the sentence, into consideration, as established *indicia*, according to the ordinances, negativing the neutrality, they decide it to be good prize. That court therefore having decided against the neutrality, we are bound by their decision.

JUDGMENT FOR THE DEFENDANT.

HENSHALL *versus* ROBERTS and Another.—*May* 8.

Assumpsit by executors containing two sets of counts, one upon promises made with the testator: the other stating that the defendant *being indebted to the testator for goods sold, after his death, promised to the* plaintiff, executor, *and* executrix, *as aforesaid, to pay, &c.; also, that the* defendant accounted with the plaintiffs *as* executrix *and* executors *as aforesaid, concerning money due to the* plaintiff, executrix, *and* executors, *as aforesaid, and being thereupon found indebted to the* plaintiffs, executrix, *and* executors *as aforesaid, promised to pay them,* executor *and* executrix, *as aforesaid: also, containing a count for interest due to the* plaintiffs *as* executrix *and* executors: *Held, on error, that the count on an account stated, could not be joined with the counts for goods sold, &c. Q. Whether a count upon promises with one* as executor, *can be joined with others on promises with the testator.*

ERROR from the court of *common pleas*. The *plaintiffs* below commenced their declaration as follows:—*S.*

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Henshall was attached to answer *Sarah Roberts*, &c. executrix and executors of the last will and testament of *William Roberts*, deceased, which *W. Roberts* was executor of the last will and testament of *W. Danson* of a plea of trespass, on the case, &c. The declaration then contained counts for goods sold and delivered, &c. on promises, to *Danson*, in his life-time, and other counts, on promises made to the *plaintiffs* below. "For that, whereas the said *S. Henshall* afterwards, and in the life-time of the said *W. Danson* and of *W. Roberts* respectively, was indebted to the said *W. Danson* in other 500l. for goods sold and delivered by the said *W. Danson*, in his life-time to the *defendant* at his request; and being so indebted, the *defendant*, in *consideration* thereof, afterwards, and after the decease of the said *W. Danson*, and *W. Roberts* respectively, promised the said *Sarah*, &c. executrix and executors as aforesaid, to pay to them the said sum whenever they should be thereunto afterwards requested.

"And whereas, the said *S. Henshall* afterwards, to wit, &c. accounted with the said *Sarah*, &c. executrix and executors as aforesaid, concerning divers other sums of money to the said *S.* executrix and executors as aforesaid, from the said *S. Henshall*, before that time due and owing and then in arrear and unpaid; and upon that account the said *S. Henshall* was found in arrear and indebted to the said *Sarah*, &c. as executrix and executors as aforesaid, in the further sum of 500l. the said *S. Henshall* afterwards, to wit, on, &c. promised the said *Sarah*, &c. executrix and executors as aforesaid, to pay them the said last-mentioned sum of money, whensoever, &c. And whereas, the said *S. Henshall* was indebted to the said *Sarah*, &c. as executrix and executors as aforesaid, in the further sum of 500l. for certain interest before that time, due and owing from the said *S. Henshall* to the said *Sarah*, &c. as executrix and executors as aforesaid, for and on account of the said *Sarah*, &c. executors as aforesaid, at the instance of the said *S. H.* having forborne and given day of payment to the said *S. Henshall*, of divers sums of

money, before that time due and owing to the said *W. Danson*, in his life-time, and at the time of his death, by the said *S. Henshall*, due and owing to the said *plaintiffs*, as executrix and executors aforesaid, the said *S. Henshall*, in consideration thereof, &c. promised the said *plaintiffs*, executrix and executors as aforesaid; yet, &c. Profert of the letters testamentary of *Danson* and *Roberts*.

On this *declaration* there was judgment by default, and afterwards error was brought in this court.

JERVIS, for the *plaintiff* in error. "The question upon this record is, whether the *plaintiffs* have not joined in this declaration several causes of action, as executors, with a a cause of action in their own rights. The true rule, as to joinder of action, is to see whether the like judgment may be given, and the same plea pleaded, to each count. *Jennings* v. *Newman*,* *Brown* v. *Dixon*.† But unless those two things concur, the causes of action cannot be joined. Here there are two sets of counts; first, on promises made to the deceased in his life-time, and, secondly, on promises made to the executors, on contracts previously made with the deceased in his life-time, which may be joined; but the counts on an account stated, and for interest, are upon promises made to the *plaintiffs* for contracts originally made with themselves. Here then, although the *defendant* may plead the same plea, yet the judgment would be different. It is usual, indeed, to join a count on an account stated with the executors, but it is then always stated that the *defendants* accounted with the *plaintiffs* as executors of and concerning monies due to the deceased in his life-time, and then the promise is laid to pay to the executors. That was the case in *Secard* v. *Atkinson*;‡ here it is totally different; the accounting is stated to be with them 'being executors as aforesaid,' but

* 4 Term Rep. 347. † 1 Term Rep. 374.
‡ 1 *H. Black.* 102.

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not 'as such executors.' The next count is founded clearly on a contract made entirely with the *plaintiffs*, and is within the case of *Rogers* v. *Cook*.* The forbearance, as stated here, is as much a distinct consideration as if money had been forborne, and the party had agreed to pay a sum of money for the forbearance, and then had given a promissory note for it to the executor, as executor. But in *Betts* v. *Michel* † there was a count on a promissory note to the *plaintiff* 'as executor,' and the court held that it could not be joined with a count on promises with the deceased. And although, when recovered, this may be assets, yet that is immaterial, for in *Bolland* v. *Spencer*,‡ Lord *Kenyon* said, that the rule laid down by *Buller*, *J.* in *Cockerell* v. *Keynaston*, was not the correct rule; but that the true distinction is whether the cause of action accrues in the personal or representative right of the executors. *Bryden* v. *Parkes*. ‖—*Ord* v. *Fenwick*,§ in which *Betts* v. *Michel* was cited, was also a case in which the *plaintiffs* declared 'as executors."

BOSANQUET, *contrà*, "The whole tenor of this declaration shews that the promises were made to the *plaintiffs* in their representative capacity, for it is stated that they were executors, and the promises are to them 'being executors as aforesaid."

Lord ELLENBOROUGH, C. J. "You must shew that the *defendants* accounted with the *plaintiffs* as executors; but this may be an account concerning something in a different right. We cannot take it by intendment."

BOSANQUET. "The whole declaration is by them in their representative capacity; the promises being laid

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* 1 *Salk.* 10.
† 10 *Mod.* 316.
‡ 7 Term Rep. 358.
‖ 2 *Bos.* and *Pull.* 424.
§ 3 *East*, 110.

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with them 'being executors as aforesaid,' it is the same as if it had been 'as executors as aforesaid."

Lord ELLENBOROUGH, C. J. "The count on the *insimul computassit* is better than the other on the forbearance, but if there is one bad count, that is sufficient to reverse the judgment. On that count the question is pretty clear; on the other, as to the account stated, there is a great contradiction of authorities, and I should wish it to be argued on a more formal record."

BOSANQUET was, however, allowed to look into the cases and argue it, if he could afterwards, and accordingly, on the last day of the term, he said that he could find no cases to support him in supplying the want of the words '*as executrix*,' &c. in the count on an account stated, and, therefore, he declined arguing it; but he moved for a *venire facias de novo* to assess damages only on the counts in the representative rights of the executors; and he cited *Astle* v. *Grant*,* where the court permitted the party to enter a *nolle prosequi* as to certain counts, after demurrer.

THE COURT did not at first see any objection to granting a *venire facias de novo*; but upon recollecting that it was upon a writ of *error*, they said, they knew of no case in which it had ever been done, after error brought. The rule *nisi* was therefore refused and there was

JUDGMENT FOR THE PLAINTIFFS IN ERROR.

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* 3 *Bos.* and *Pull.* 170.

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EVANS *versus* THOMPSON.—*May* 11*th.*

Two parties submitted to arbitration by bond, and agreed therein that the submission to the award should be made a rule of court, and afterwards, by a memorandum indorsed on the bond, after the time of making the award had expired, agreed that the time for an umpire *to make his umpirage should be extended to a future day, but without expressly mentioning that this new submission should be made a rule of court: Held, that this memorandum was a virtual incorporation of all the terms of the bond not inconsistent therewith, and therefore must be taken as containing an agreement to make the submission a rule of court, under the statute* 8 & 9 W. III. *c.* 15. *The case of* Jenkins *v.* Law, 8 *Term Rep.* 87, *was over-ruled, upon consultation with the other courts.*

EVANS *versus* THOMPSON.

ON a rule to shew cause why a rule made in *Michaelmas* term, should not be amended by confining such rule to the submission made by the bond and condition therein recited, and excluding two subsequent indorsements of the 21st and 28th of *September*, for enlarging the time for the arbitrators to make their award, &c. it appeared that the parties had entered into a bond of arbitration, with an agreement "that the said bond and submission thereto, should be made a rule of his Majesty's court of *King's Bench*, if the said parties thereto should require the same." On the 21st of *September* a memorandum was indorsed, whereby it was agreed that the time for the said arbitrators making their award should be extended from that day to the 24th of *September*, and for making the umpirage [the bond containing a clause for providing an umpire] to the 1st of *October*; and on the 28th of *September*, 1803, another indorsement was made and signed by the parties, by which the time for the umpirage was extended to the 6th of *October*. An *umpirage* was accordingly made on the 5th of *October*. The submission to arbitration was afterwards made a rule of this court, the rule reciting the bonds and the agree-

ment to make the same a rule of court; and also that it had been agreed that the time should be enlarged. A motion for an attachment was made for non-performance of the award of the umpire; and in order to avoid the effect of it, the above rule of court, concerning the submission, was obtained.

ERSKINE and MARRYATT, in support of the rule, cited *Jenkins* v. *Law*,* and stated that their objection to the rule was, that the party against whom it was made had not consented to make the submission to arbitration a rule of court; and to shew that this consent was necessary to give the court jurisdiction, they read the statute of 9 & 10 *W.* III. whereby it is enacted "that it shall be lawful for the parties, &c. to agree that their submission of their suit to the award shall be made a rule of court, and to insert such agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award, which agreement being so made and inserted in their submission, or promise, or condition of their respective bonds, shall, on affidavit, be entered of record in such court, and a rule thereupon made pursuant to such submission." And they argued that at the time of making the last agreement, to enlarge the time, the bond, which contained a clause as to making the submission a rule of court, was *functus officio*, and the parties, to enforce the agreement by action, could only have declared upon the agreement, and not the bond, which, being an instrument of an higher nature, could not, they said, be considered as incorporated into the agreement, which was an inferior instrument, even though it should contain some terms of reference in it.

LAWRENCE, J. "It comes to this question, whether it is not a new agreement, adopting every part of the former bond."

* 8 Term Rep. 87.

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LE BLANC, J. "You must adopt all or none. We must, however, over-rule the case of *Jenkins* v. *Law*."

Lord ELLENBOROUGH, C. J. "The question is, whether the parties can annex to this memorandum stipulations tacitly implied in the nature of the reference, though not expressed in the terms of the indorsement, by incorporating those of the former bond. We do not strain the construction of the statute by acting upon this view of the case further than we do in other cases. In the case of holding over a lease, where there are covenants on both sides, the law raises a promise that the party shall hold over, on terms of the most laborious invention, according to the framing of the original covenant. This indorsement will not do at all as an agreement for arbitration without some reference to the bond. Indeed, what writing of any kind can be understood without some reference to something else. Without referring to the bond, what are we to understand that the parties mean here? They do not even specify the names of the arbitrators. It must be considered as a virtual incorporation of all the terms of the bond, for the purpose of avoiding the insertion of a recital in words. It amounts to this—'The day now substituted, shall be the day when the award shall be made, under the terms of the former agreement.' This construction would not strain the terms of the act of parliament. But we will consult the other courts, that there may be an uniform rule."

LAWRENCE, J. "No violence can be done to the act of parliament. Suppose there is a short indorsement on a lease for seven years longer, that is an agreement that the parties will continue between them the character of landlord and tenant."

The court took time to consider from *Hilary* Term, when the case was argued; and now the opinion of the court was delivered in substance as follows, by

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Lord ELLENBOROUGH, C. J. after stating the case, and that the agreement to enlarge the time was made a rule of court. "To this it was objected that the authority given by the indorsements was not sufficient for the purpose, as it did not contain any *express* consent to make this submission a rule of court, the former agreement having expired; and this objection was founded on the authority of the case of *Jenkins* v. *Law*. On considering that case, it appears that the objection was there taken by one counsel, and was acceded to by the other; but the point was not brought directly before the court for their consideration; and, therefore, on the circumstances of this case we are of opinion that the case referred to cannot be supported; for, the agreement to enlarge the time for making the award, must be considered as virtually incorporating in it all the conditions of the original agreement which are consistent with it, as if it had been formally set forth in terms; and, therefore, not only the agreement to submit to arbitration is continued, but also the original agreement to make the submission a rule of court."

RULE DISCHARGED.

DOE on the Demise of WHITE *versus* SIMPSON.—*May* 9.

A testator devised to three trustees, and the survivor, and the executors of such survivor, messuages, &c. and all arrears of rent, and a bond of one of the tenants for securing such arrears, in trust, that they, out of the rents and profits, should pay certain annuities for lives, and after payment of the annuities, should pay to his brother 800*l. And from and after payment of the said annuities, and the said sum of* 800*l. he devised the same to his son* William *for life, remainder over, for the lives of other persons; remainder to* C. W. *and his heirs male; remainder to his own right heirs. And he gave to the executors, and the survivor, and the executors of such survivor, power to grant building leases, and he gave to two of the executors* 10*l. per annum, a-piece, for so long as they should act in the trusts. Held, that the trustees took only*

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a chattel interest during the lives of the annuitants, and until the 500*l. was raised, and that those purposes being satisfied, and the devises for life being dead, the legal estate became vested in the remainder-man in tail,* C. W.

Doe dem. White versus Simpson.

EJECTMENT for premises in *St. Matthew, Bethnal Green,* in *Middlesex.* The *defendant* held as assignee under a lease, granted under a power contained in the will of one *Charles White,* dated *July* 1754. At the trial it was found by the jury, that the power had not been pursued, and the *plaintiff* obtained a verdict. The counsel for the *defendant* objected that the demise should not have been laid by the lessor of the *plaintiff,* but by the heir of the surviving trustee under the will, in whom, as he contended, the legal estate was vested. Lord Ellenborough, C. J. over-ruled the objection, but gave leave to move for a non-suit, in case the court should be of opinion with the *defendant.* The devise in the will upon which the question arose was as follows: "I give and devise unto my cousin *Fitz Ferrand,* Mr. *Siddal,* Mr. *H. H.* and the survivor of them, and the executors and administrators of such survivor, all those my lands, messuages, &c. including the premises in question, together with all arrears of rent due from the tenants of the said estates, and the bond and judgment I have of *John Sugar,* for arrears due, in trust that they, out of the rents and profits of the said estates, and the arrears due, shall pay one annuity of 50*l.* to my sister Mrs. *Holmes,* for her life, by half yearly payments, from the time of my decease, and also pay one other annuity of 50*l.* to my sister Mrs. *Dickenson,* for her life, by half yearly payments, and from and after payment of the said annuities, then in trust, to pay to my brother *Thomas White,* and my nephew, his son, *Charles White,* and *Peter Holmes,* and the survivor of them, and the executor of such survivor, the sum of 800*l.* to be by them paid, and applied to the sole use and benefit of the said children of my said brother *William,* in such manner and proportion, and to and for such uses as they shall think best. And

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from and after payment of the said annuities, and the said sum of 800l. I give and devise my said estates in *London*, &c. last mentioned to my brother *William* for life, remainder to his second son *Samuel* for life, remainder to his third son *Charles* for life, remainder to his youngest son *James* for life, remainder to my brother *T. White* for life, and after his decease to his son, my nephew, *Charles White*, and his heirs male, and for want of such issue, to my right heirs for ever. And I do hereby give and grant unto the said Mr. *Hyatt*, &c. and the survivor of them, and the executors of such survivor, full power and authority to grant any building lease and leases, and any other lease or leases, as often as there shall be occasion, of the said estate so devised to them in trust, as aforesaid, or any part thereof, for any number of years, so as such lease and leases so to be granted be made for the most or best rent that can be had or gotten for the same without any fine or income; and I do hereby direct, that so long as the said Mr. *Ferrand* and Mr. *Syddal* shall act in the said trust, they shall be paid or allowed, every year, the sum of 10l. a-piece for their trouble. All the remainder-men for life were dead, and also the annuitants, and the sum of 800l. had been paid as required under the will, previous to the bringing of the ejectment, by the lessor of the *plaintiff*, *C. White*, the nephew, and devisee in tail.

A rule to shew cause, why a non-suit should not be entered, was obtained in *Hilary Term*, and

Wood, for the *plaintiff*, shewed cause. "The devise to the trustees does not give them an estate in *fee*, but only a chattel interest, for certain purposes in the will, namely, the payment of debts, the legacy of 800l. and the annuities, which continued no longer than was requisite for those purposes; but, immediately after they were satisfied, the estate became vested in the next remainder-man in tail. *Co. Lit.* 52. (a) *(tenant a terme de vie)* "In some cases a

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man shall have an uncertain interest; as if a man devise to his executors for payment of his debts, and till his debts are paid, the executors have only a chattel and uncertain interest, until his debts be paid," and "being a chattel, it shall go to the executor."* There are even other cases, where devises to trustees and their heirs, for the payment of legacies, and for payment of annuities, were held only to give an estate during the lives of the annuitants, notwithstanding words of inheritance. Lord *Say* and *Sele* v. *Jones*. †

[Lawrence, J. "Lord *Kenyon* said, that case stood on its own particular grounds, and that he should be bound by it only, when the case was in the same terms."]

"Courts of law never give to trustees any greater legal estate than is just necessary for the purposes of the will of the testator. *Shapland* v. *Smith*, ‡ *Sylvester* v. *Wilson*. ‖ The argument in favour of the estate in fee vesting in the trustees, attempted to be drawn by the *defendant*'s counsel, from the circumstance of the power to grant leases, by no means follows, for a power may be granted without giving an estate commensurate to it; as a power to a tenant for life to grant leases for any long term. The purposes of this trust being now completely satisfied, the legal estate is vested in the remainderman, the lessor of the *plaintiff*."

Gibbs, for the *defendant*.§ "Where a devise is to trustees for payment of debts, it gives the fee without words of inheritance."

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* See also *Cordell*'s case, 8 *Co.* 96; also *Cro. Eliz.* 316. *Barnardiston* and Others v. *Carter*. 1 *P. W.* 509, 518. 2 *Bro.* Parl. Ca. 1. *Hilchins* v. *Hilchins*, 2 *Vernon*, 403.

† 3 *Bro.* P. C. 458. 8 *Vin.* Abr. 262.

‡ *Brown*'s Chan. Ca. 75. ‖ 2 Term Rep. 444.

§ *Rose*, who was with him, was not heard.

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Lawrence, J. "Not when there are devises over,"

Gibbs, then cited *Jenkins* v. *Jenkins*, 1 *Willes*'s Rep. 650, and said "that the estate must continue as long as the power; that here the testator saw that his estate would be better administered, by giving the trustees, for the benefit of the persons who were interested in the possession of the estate, a power to grant building leases; and that it could not be supposed that he intended that power only to last during the lives of the annuitants, but that if the construction in favour of the *plaintiff* were put upon the will, then the power would be limitted to the duration of the estates of the trustees."

Lawrence, J. "May not the estate cease, and the power continue afterwards, as a naked power? You lay it down that wherever an estate is once given with a power, the estate will be extended, for the purpose of the power."

Gibbs. "I do not lay that down as a point decided, but only as a principle, deduced by me from some of the cases."

The case then stood over, and afterwards in this term, the opinion of the Court was delivered to the following effect, by

Lord Ellenborough, C. J. After stating the case, and the material parts of the will. "The lease under which the *defendant* claimed, was found, by the jury, to be void, but it was contended for the *defendant*, that the action was ill brought by the lessor of the *plaintiff*, because the legal estate was not in him, but in the legal representative of the surviving trustee, and the question, therefore, is, whether the original trustees took an estate in fee, or only a chattel interest? The case principally relied upon by the *defendant*'s counsel is the case of *Jen-*

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kins v. *Jenkins*, in Lord C. J. *Willes*'s Reports, 650. In that case the testator, by his will, gave to Mrs. *H.* 5l. per annum to be paid her *out of the premises*, by his executor as long as she should live; and the court founded its opinion upon this ground, that as the annuity was to be paid by the executor out of the estate, the intent of the devisor could not take effect, unless he had such an estate as would last at least as long as the annuity was payable; and Lord C. J. WILLES says, "Whether he has an estate for life, or in fee is now immaterial; but we rather think he has an estate in fee, because there is no case where a devisee has been adjudged, by virtue of the words *paying out*, to have a larger estate than an estate for his own life, in which it has not also been adjudged that he took an estate in fee." But nothing here turns upon that question, for the words in this case are *out of the rents and profits* only, and it has never been held that they give an estate in fee. The cases cited by Mr. WOOD, for the *plaintiff*, appear to establish, that on a devise to trustees of an estate for life to them and their heirs, in trust, to pay the profits or an annuity, and after the death of the annuitant, the devise to go over, the trustees take only an estate for the life of the *cestui que trust*; and *Co. Lit.* 42, and Sir *W. Cordell*'s case, 8 *Co.* 96, establish, that, if estates be devised to executors generally, for payment of debts, they take only a chattel-interest. Hence, it follows, that where the trusts can be satisfied without a fee-simple, the trustees shall not take, by implication, a greater estate than is necessary, for the purpose of satisfying the trusts. I have not met with any case where the trustees take an estate other than a chattel-interest, or for life, or in fee. But I see no reason why they may not take an estate for the lives of the annuitants, with a term for raising the 800l. If the trustees were to take a fee, the bond and judgment, which is devised to them for the same purpose as the profits of the estate, would go to different parties after the decease of the survivor, the one to the personal representative, and the other to the heir; but if they take a chattel-interest in the rents and profits, then they will both go alike. It

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has been argued, however, that the leasing power gives the executors, by necessary implication, an estate in fee. But the testator gives them power to grant leases, as often as there shall be occasion, of 'the said estates so devised to them, in trust, *as aforesaid,*' connecting the executing of the power with the *estate before* given; and also he seems to have contemplated the execution of the trust, and consequently the estate, as not going further than the life of the trustees; for he gives two of them an annuity of 10*l.* a year, so long as they shall act in the trust, for their trouble. Now, a yearly allowance to trustees so long as they shall act, is not very consistent with an estate to the *heirs* of the surviving trustee, without giving them also a compensation for their trouble. But then it has been argued by the counsel for the *defendant*, that the estates for life might continue longer than the leasing power annexed to the estate of the trustees, in which case a great inconvenience would arise to the persons entitled to the beneficial possession, for want of such a power, which the testator seems to have wished to prevent; and that the estate might be injured for want of such a power in the persons who had estates for life, or during even the estates of the remainder-men in tail. Supposing that the devisees for life had survived the period during which the trust for the lives of the annuitants had continued, the inconvenience of suspending the leasing power might to a certain extent exist. Still if it did to a greater degree than it really does, that would not warrant a construction which the terms of the will do not fairly support. We, therefore, are of opinion, that the trustees took an estate by implication for the lives of the annuitants, and for a term sufficient to raise the 800*l.* and that after those trusts were satisfied, the estates to the remainder-men for life and in tail took effect, as legal estates; and that the lessor of the *plaintiff* had such an estate as might enable him to bring ejectment.

RULE DISCHARGED.

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SEAWARD *versus* WILLOCK.—*May* 11.

A. devised certain lands, after the decease of a tenant for life, "*to* T. S. *for life, and, after* him, *to his eldest or any other son, after* him, *during his natural life, and after* them *to as many of his descendants, issue male, as should be heirs of* his *and* their *bodies, down to the tenth generation, during their natural lives:*" *Held, that* T. S. *took an estate for life, with several remainders in tail, to his sons.* T. S. *becoming a bankrupt, the estate was sold by auction, the purchaser agreeing to pay for the same at* Easter, 1803, *on having a good title, the conveyances to be at his own expence: Held, that the above title appearing on the abstract delivered, and no other being shewn, till after an action brought by the purchaser, for the deposit-money had and received, the purchaser might recover, in such action, without tendering a conveyance, notwithstanding that, in fact, the bankrupt, being heir general of the testator, and having no sons, his assignees might afterwards proceed in equity to compel a specific performance of the agreement.*

SEAWARD *versus* WILLOCK.

THIS was an action brought against the *defendant*, an auctioneer, employed by the assignees of *Thomas Southcomb*, a bankrupt, in the sale of an estate of the bankrupt by auction, to recover the sum of one hundred and thirty pounds, the deposit money paid by the *plaintiff*, who was the highest bidder at such auction, with interest and costs. The *defendant*, at the time of the sale, entered into the following undertaking, in writing, at the foot of the conditions of sale:— "If the title is not satisfactory, the deposit, interest, and costs to be returned—*John Willock.*" The declaration contained a special count upon this undertaking, and the common counts for money paid, had, and received, and an account stated, to which there was a plea of the general issue. The cause came on to be tried at the summer assizes for the county of *Devon*, before the Right Honourable Lord *Alvanley*, when a verdict was found for the *plaintiff*, with damages 200l. and 40s. costs, subject to the opinion of this court on the following case:—On the 25th of *March*, 1753, *Lewis Southcomb*, clerk, being seised in fee of the

remainder of the estate in question, after the determination of the life-estate of *George Portbury*, made his will of this date, duly executed, and thereby gave and devised as follows:—" To my son *John*, I leave the entire guardianship of *Thomas*, the son of my son *Thomas Southcomb*, and also of my grand-daughter, Elizabeth, his sister; to him the said *Thomas*, I do give my estate of *Holcomb Burnel* (being the estate in question) during his natural life, as soon as it shall fall; but to his trustee, in his behalf, shall be committed the profits of the said estate until he shall arrive at the age of 21 years; and after him I do give it to *his* eldest, or any other son after *him*, during *his* natural life, and after *them* to as many of *his* descendants, issue male, as shall be heirs of *his* or *their* bodies down to the tenth generation, during their natural lives." The devisor died in the latter end of the year 1753, or beginning of the year 1754, leaving his grandson, the devisee, his heir at law. *George Portbury*, the tenant for life, died in 1763, and upon his death, the devisee, *Thomas Southcomb*, entered into the possession of the estate, and continued in such possession until his bankruptcy, as hereinafter mentioned. On the 28th of *November*, 1798, a commission of bankrupt issued against the said *Thomas Southcomb*, who became and was duly declared a bankrupt; and on the 6th of *November*, 1802, a bargain and sale of his real estate was duly made to assignees. On the 9th of *November*, 1802, the *defendant*, by the direction of the assignees, put the estate up to sale by auction, and by the conditions, the purchaser was to pay down a deposit of 10l. per cent. and the residue on or before lady-day, 1803, on having a good title; the conveyance to be at his own expence. The *plaintiff* was the highest bidder, and paid the deposit; but on the abstract being delivered, in which it did not appear that the bankrupt was the heir at law of *Lewis Southcomb*, nor was any document stated to prove the death of *G. Portbury*, which it was insisted on by the assignees must, from the distance of time at which he had been shewn to be, first, in existence, be pre-

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sumed, refused to complete the purchase, alleging that a good title could not be made, and insisted upon a return of the deposit &c. on that ground. The bankrupt, who, as is before stated, was the heir at law of *Lewis Southcomb*, has no children, and is willing to join the assignees in any act that shall be thought necessary to make a good title and conveyance; but neither of these circumstances was stated in the abstract, or communicated to the *plaintiff*, or his attorney, until a fortnight before the assizes.—*Question*—Whether the *plaintiff* is entitled to recover? or, as stated in the margin of the case, first, whether the bankrupt took an estate-tail, or any, and what other state, under the will of *Lewis Southcomb*; and, secondly, supposing him to have taken an estate for life only, whether, under the circumstances of his being the heir at law of the devisor, and having no child, the assignees may, by fine or otherwise, with or without his joining, make a good title to the *plaintiff*?

COURTNEY, for the *plaintiff*. "If the bankrupt took an estate-tail, it must be admitted that the bargain and sale from the assignees would be sufficient to convey a title to the purchaser; but the intention of the devisor was to keep the estate in the family as long as he could, and that intention will be best effectuated by giving to the first taker an estate for life, which was clearly the intention of the testator." He cited *Archer*'s case,* *Wyldes'* case,† *Ginger* v. *White*,‡ *Goodtitle* v. *Woodhull*,§ and *Somerville* v. *Lethbridge*;‖ and, upon its being observed by LAWRENCE, J. that the bankrupt having no son *in esse*, the *plaintiff* might be compelled to take it hereafter; he said, that he could not but admit that, as the case is at present circumstanced, there is a good title, but that it

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* 1 *Co.* Rep. 66.
† 6 *Co.* Rep. 16, (b).
‡ *Willes*, 348.
§ Ibid. 592.
‖ 6 Term Rep. 213.

ought to have appeared at the time of delivering the abstract."

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GASELEE, *contrà*. "If we go into equity we may compel a specific performance, and the court will there say what costs shall be paid. The action should have been for damages only for not completing the title in due time, and indeed it was no condition of the sale that the title should be completed in 1803, so that the *plaintiff* has brought his action too soon; and now it is admitted, that he may have a good title. There was no conveyance tendered, which there ought to have been, in order to entitle the *plaintiff* to recover in this action."

[Lord ELLENBOROUGH, C. J. "That is not necessary, and the parties could not mean a latent good title, but such a title as is made to appear to them."]

"Then, on the abstract, the *defendant* had a good title, for he took an estate-tail under the will. The cases cited were prior to *Robinson* v. *Robinson*,* and went upon the principle that an estate for life cannot be extended by implication into an estate-tail; but that appears now clearly a mistake. *Somerville* v. *Lethbridge* is distinguishable, because the devise was not for life, but for 99 years, determinable on lives. The question then is, whether, in order to effectuate the general intention of the testator, it is not necessary that the first taker should have an estate-tail. Now the general intention of the testator was, that all his descendants should inherit, though it was his particular intention to give them each an estate for life. The words '*his descendants as shall be heirs male of his or their bodies, down to the tenth generation*,' apply to the first devisee."

* 1 *Burr.* 38.

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GROSE, J. "The testator intended to keep the estate in his own family as long as possible, and that is best done by giving the first taker only an estate for life, with an estate-tail to all his descendants."

THE COURT observed that it was little more than a question of costs to decide a wager between two conveyancers; but took time to consider of the general intention of the testator. And now the opinion of the court was delivered in effect as follows, by

Lord ELLENBOROUGH, C. J. "On the argument of this case, it has been contended for the *plaintiff*, that the bankrupt did not take an estate-tail, but only for life. But, in order to give him an estate-tail under this devise, it has been contended, on the other side, that the general intent of the testator requires that he should take an estate-tail. But I do not find that such was his intention; on the contrary, it is plain, that he meant merely to give an estate for life to his grandson, and after him to his son, and so on, down to the tenth generation. This, in strictness, he could not do by law, for there cannot by law be successive limitations for life to persons unborn. Nor can we make a new will for the testator, because that which he has made cannot take effect. To establish it, as it is contended for by the *defendant*, would be to turn a legal devise into an executory trust. The words *his descendants* may be read two ways, referring either to the descendants of *Thomas Southcomb* or the descendants of his son. And it would be most advantageous for the *defendant* to read it, 'And after *him*, *Thomas Southcomb*, I do give it to *his*, *Thomas Southcomb*'s eldest or any other son after him, during his natural life, and after them to as many of *his*, *Thomas Southcomb*'s descendants, issue male, as shall be heirs of *his*, *Thomas Southcomb*'s, or their bodies, down to the tenth generation, during their natural lives.' And so reading it, we find no words shewing a general intent to give an estate-tail, contradictory to the express estates

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for life. In *Robinson* v. *Robinson*,* and in *Doe d. Blandford* v. *Applin*,† there was a general intent apparent, and in *Doe d. Bean* v. *Halley*,‡ there was a devise to the testator's nephew, *M. Halley*, for life, remainder to his eldest son, lawfully to be begotten, and the heirs of such son; and in default of issue male of his said nephew, then to *Bean*; and the court, in order to effectuate the testator's general intent, determined that *M. Halley* took an estate for life, remainder to his eldest son in tail, remainder to himself in tail, in order to let in all his issue male, the estate not being *given over* but in default of issue male. In all these cases, expressions were used that the land should continue in the issue of the first taker indefinitely, and without limiting for what estate. But in this case the testator has not used such terms, but has narrowed the term of the descendants' estates, for their lives. And this is not properly a case of double intent, one inconsistent with the other, but a case of only a single intent, which cannot take effect by law. Under this devise, therefore, we hold that *Thomas Southcomb* took no greater estate than for life. At the time of the title being delivered in, and afterwards, even nearly up to the time of the trial, it rested upon the supposition that the devisee, the bankrupt, was tenant in tail; the action at law, therefore, lies for the non-performance of the agreement by the *defendant*. How far the title may be made good by subsequent circumstances, is not a matter for our present consideration."

POSTEA TO BE DELIVERED TO THE PLAINTIFF.

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* 1 *Burr*. 38. † 4 Term Rep. 82. ‡ 8 Term Rep. 5.

1804. SANDBY, Clerk, *versus* MILLER.—*May* 11.

Assumpsit *for the single value of tithes is not a matter* "*concerning or properly belonging to the ecclesiastical court,*" *under the exception in the* 11*th section of the* 39 & 40 Geo. III. *c.* 104, *so as to oust the* court of requests, *in* London, *of its jurisdiction, where the amount of the demand does not exceed* 5*l. and therefore, if the* plaintiff *sue in the court of* king's bench *for the same, the* defendant, *after verdict, will be permitted to enter a suggestion upon the roll to bar him of his costs.*

SANDBY, Clerk, *versus* MILLER.

THIS was an action of *assumpsit* brought by the *plaintiff*, who was rector of the parish of *Camberwell*, in *Surrey*, for the single value of tithes due from the *defendant* to the *plaintiff* for two acres of land in that parish. For two years previous to *Lammas*, 1801, the *defendant* had paid a composition of two pounds two shillings *per acre*; since that time the *plaintiff* insisted upon having more, and demanded 5*l.* 16*s.*—The *defendant* had paid 2*l.* 14*s.* 3*d.* for which credit was given by the *plaintiff*, in an account delivered in writing, by which his demand was therefore reduced to 3*l.* 1*s.* 9*d.* The first count of the declaration was upon a promise to pay so much *per acre*, and there was another count "for that in consideration that the *plaintiff* had permitted the *defendant* to take the tithes away, the *defendant* promised to pay *quantum valebant*," and upon this count the jury gave the *plaintiff* a verdict for a small sum under 5*l.* being the difference between the original demand and the money paid into court.

MARRYATT, for the *defendant*, obtained a rule in *Hilary* term, to shew cause why he should not be permitted to enter a suggestion on the roll under the last *London court of Requests' Act*, 39 & 40 *Geo.* III. c. 104, (public local acts) in order to bar the *plaintiff* of his costs, the demand being for less than 5*l.* and the *defendant*, who keeps a shop in *London*, and had actually been served with the process in this case within the city of *London*, although

he resided also in *Camberwell*, being liable to be sued in that court only.

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SANDEY, Clerk, *versus* MILLER.

WIGLEY shewed cause, and insisted that this demand was either a composition or a rent for tithes, in which the title to the freehold might come in question, and was also properly recoverable in the ecclesiastical court, and therefore came within the exception contained in the above act, s. 11.* It being the last day of the term, the case stood over for the opinion of the court, and in this term, it was delivered accordingly, to the effect following, by

Lord ELLENBOROUGH, C. J. "This was a rule obtained on the part of the *defendant*, to shew cause why the *plaintiff* should not be excluded from entering up judgment for his costs, he having obtained a verdict for a less sum than his original demand, amounting to less than 5l. under the statute 39 & 40 *Geo.* III. c. 104,† on the ground that the *defendant* was residing and gaining his livelihood within the city of *London*, and within the limits of the jurisdiction of the court of conscience for the city of *London*, and that therefore he was liable to be summoned in that court. The count, in *assumpsit*, upon which the verdict was taken, was upon a *quantum valebant* for the value of tithes due to the *plaintiff* as vicar of *St. Giles's, Camberwell*, and retained by the *defendant*. The *plaintiff* resisted this motion, on the ground of a proviso in the 11th section of the act (which his lordship read.) We are of opinion that this action, being to recover upon a *promise*, the subject of it is not a thing, in its nature, belonging to the ecclesiastical court. It is neither more

* By this section it is provided, "that the act shall not extend to any debt, where any title of freehold shall come in question, nor to any other debt that shall arise by reason of any cause concerning testament or matrimony, or any thing concerning or properly belonging to the ecclesiastical court, albeit the same respectively shall not exceed 5l."

† Public local acts.

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SANDBY, Clerk, pursuit MILLER.

per few than a civil contract, suable properly in a court of law, and is connected with the ecclesiastical court only, as matter of tithes, as to the right thereto, is, in some cases, within the jurisdiction of an ecclesiastical court. In this case, however, it cannot be said *properly* to belong to the ecclesiastical court, so as to oust the court of requests of its jurisdiction."

RULE ABSOLUTE TO ENTER THE SUGGESTION.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

In the Court of King's Bench,

IN TRINITY TERM,

In the Forty-fourth Year of King GEORGE III.

CLARKE *versus* TERREL.—*June* 2. 1804.

able. An attorney, who has drawn an agreement between two parties, will be ordered, upon motion to the court, to give over to either of them a copy thereof, to the best of his power, when the same shall be required, upon payment of the costs thereof.

CLARKE *versus* TERREL.

RULE to shew cause, why, on payment of so much as should be due, for the preparing and executing a certain assignment between *Clarke* and one *Cawley*, the defendant should not permit *Clarke* to take a copy of the said assignment, and why *Terrel* should not pay the costs of the motion. The affidavits stated that *Clarke* had applied to *Terrel* to prepare the assignment in question, and stated in effect the contents thereof, but that being obliged to bring an action against *Cawley*, who was the other party to it, and having no copy, he had applied to *Terrel*, who drew it up, for a copy, in order to be able to give *secondary* evidence of the agreement upon the trial, in case the original should not be produced, upon notice. *Terrel* swore that he had drawn the agreement, which was to be paid for by *Cawley*, who did accordingly pay for it. That the rough draught which he made contained many blanks, which were not filled up till the engrossment, and that the original was in the possession of *Cawley*, of which he informed *Clarke* when he applied to him.

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CLARKE versus TERRELL.

THE COURT, upon inquiry, finding that *Terrel* had made no offer to produce the draught which was in his possession, directed that the rule should be discharged, with costs, upon *Terrel's* undertaking to give a correct copy of the agreement, or otherwise that the rule should be enlarged, in order to make *Cawley* a party.

STRODE *versus* DYSON.

Where, on the purchase of a horse, the vendor had given a warranty of soundness generally, and the servant who was sent with the receipt to the agent of the other party, inserted, at his request, but without a special or general authority from his master, warranted sound "to the regiment." Held, that the master was not bound by this alteration of the warranty, notwithstanding the money afterwards came to his hands.

STRODE versus DYSON.

THIS was an action in assumpsit, upon the warranty of a horse. The declaration stated that in consideration that the *plaintiff* had bargained with the *defendant* for a certain gelding, for —l. the *plaintiff* undertook to deliver the said gelding sound, and averred a breach of that promise. In another count it was stated that the 10th regiment being at *Tewksbury*, the *plaintiff* undertook to deliver the horse sound at *Tewksbury*. At the trial before LAWRENCE, J. at *Gloucester*, last Lent assizes, it was proved by the Duke of *Cumberland*, that he made the contract for *Strode*, the *plaintiff*, who was an officer in that regiment; that he understood it was complete at that time, namely, that the horse should be warranted sound at the time of the sale. One *Woollett*, the servant of the *defendant*, a horse-dealer, was sent with the horse, and a receipt for the money to *Strode*, the nephew of the *plaintiff*, in *London*. The receipt was for so much money for a bay gelding, "warranted sound." *Strode* objected to the payment of the money until he had a return from the regiment that the horse was sound; and upon *Wool-*

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STROBE *versus* DYSON.

lett's telling him that his master was going to a fair, and wanted the money, he refused to pay unless it was inserted in the receipt "warranted sound to the regiment;" upon which the words "*to the regiment*" were interlined. The horse was taken down to the regiment by one of *Dyson*'s servants, with the horses belonging to the regiment, which was very usually done with respect to officers' horses; when it arrived, it was found to be very ill, and in a violent fever, and died very shortly afterwards. LAWRENCE, J. stated to the jury that he thought the contract was complied with by a delivery in *London*; and it appearing that the horse was sound when first delivered in *London*, and that *Woollet* had no authority from his master to alter the receipt, there was a verdict for the *defendant*.

And now, upon a rule to shew cause why there should not be a new trial,

PULLER, for the *plaintiff*, cited *Bolton* v. *Hildersden*,* in which it was held that a master is liable for the contracts of his servant where the consideration comes to his use, and he has not paid an equivalent for it. He also cited *Grammar and Another* v. *Nixon*.†

But the COURT were clearly of opinion against the *plaintiff*; and by

Lord ELLENBOROUGH, C. J. "The question is only, whether *Woollett* had an authority to alter the original warranty? It might as well be said that if the master had been a merchant, he might have inserted in a policy of insurance a warranty that the ship was an *American*."

RULE DISCHARGED.

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* 1 Lord *Raymond*, 224; 3 *Salk*. 234. † 1 *Strange*, 653.

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MILTON *versus* GREEN.—*June* 4.

A warrant by a justice of the peace for the county of Kent, "*directed to the constable of the half hundred of* Gillingham, *to seize the goods of* A. B." *is not,* upon the face of it, *an authority for the constable to take the goods of* A. B. *in a place, situate locally within the half-hundred of* G. *but being within the jurisdiction of the* Cinque Ports; *and therefore, upon trespass brought, the warrant is not a justification to the constable, nor is it necessary that the justice should be sued in his stead, under the* 24 Geo. II. *c.* 44. Semble, *it would be otherwise if the warrant had directed the constable to seize the goods in a particular place within the jurisdiction of the* Cinque Ports, *and not in the jurisdiction of the magistrate.*

MILTON *versus* GREEN.

THIS was an action of trespass against the *defendant*, one of the constables of the half-hundred of *Chatham* and *Gillingham* in the county of *Kent*, for taking the goods and chattels of the *plaintiff*, one *Samuel Milton*, in the parish of *Brench*; which was tried at *Maidstone* the last Lent assizes before HEATH, J. The goods were taken under a warrant of *distress* by one of the magistrates of the county of *Kent*, directed to the constable of the lower half-hundred of *Chatham* and *Gillingham* authorizing him to levy the same on the goods of one *Samuel Milton*, for a fine or penalty under the militia laws. The counsel for the *defendant* objected, at the trial, that, the constable acting under the authority of the magistrate, he ought to have been made a party to the suit; and the learned judge was of that opinion. The counsel for the *plaintiff* then proposed to call evidence, to shew that the parish and manor of *Brench*, though locally situate in the half-hundred of *Gillingham*, was not within the jurisdiction of the same, but was within the jurisdiction of the *Cinque Ports*, and therefore contended that as the warrant authorized the constable to act only within the jurisdiction of the magistrate, in the lower half-hundred of

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Gillingham, the constable had exceeded his authority, and could not set up the warrant as his justification. And it appeared that the warrant contained no particular description of the place in which the constable was to take the goods, so as to require the constable to act beyond his proper jurisdiction. The learned Judge notwithstanding directed a nonsuit. And a rule having been obtained in last *Easter* Term, by SHEPHERD, Serj. to shew cause why there should not be a new trial,

BEST, Serj. PITCAIRNE, and REYNOLDS shewed cause, and contended that the question was only whether the constable had acted in obedience to the magistrate, for if the magistrate is liable to the action he ought to have notice according to the statute, 24 *Geo.* II. c. 44; and it is immaterial whether the party lived in the lower half-hundred of *Gillingham* or not. That the magistrate had, in fact, by the warrant, taken upon himself to decide whether the party was liable to the penalty under the militia laws, which depended entirely upon the local residence of the *plaintiff*, and the magistrate alone was to be blamed. That the magistrate having decided upon that point, the warrant must be considered as a sufficient authority for the constable. The magistrate had, in fact, by adjudging the penalty, taken upon himself to adjudge that the *plaintiff* was locally resident within the lower half-hundred of *Gillingham*.

Lord ELLENBOROUGH, C. J. "If this had been specially pleaded by the constable, how could he shew that this warrant was to be executed within the manor of *Brench*? Suppose he had gone into the county of *Surrey*, the magistrate would not be to blame, except for what he had authorized the man to do under his warrant, and how did he on the face of the warrant authorize the constable to go into the manor of *Brench*? Or, suppose the constable had returned that the *plaintiff* had no goods

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in the county of *Kent*, would not that be a good return to the magistrate? Or if he had goods within the half-hundred of *Gillingham*, then, notwithstanding the original *adjudication* against the *plaintiff* may be bad, yet the warrant would have been an authority to the constable to take the goods in that place."

LAWRENCE J. "The manor of *Brench* does not extend over the whole of *Gillingham*. Your argument fails therefore, because the warrant does not describe that he lives in that part of the parish of *Gillingham* which is within the manor of *Brench*. If so, then we might have said that it was bad as to the justice, but still it would have been an authority to the constable. Here, on the contrary, it appears only as an authority to act within the proper jurisdiction of the magistrate. I see nothing in the warrant to limit it to less than the jurisdiction of the magistrate, nor any thing to extend it beyond that jurisdiction."

BEST, Serj. then cited *Price* v. *Messenger*.*

Lord ELLENBOROUGH, C. J. "There the warrant describes the very place where the persons are to take the goods, which place is in the county of *Surrey*. If they take that which they are not directed to take in the warrent, I must, with all due respect for that authority, say they do not act under the authority of the warrant."

It was then contended for the *defendant*, that it was apparently a mistake only of the magistrate, and not of the constable. That he was directed to take the goods of *Samuel Milton*, and that it was not even presumed at the trial that there was any other *Samuel Milton* in the parish of *Gillingham* than the *Samuel Milton* who lived in the manor of *Brench*, and that this was sufficient to distin-

* 2 *Bos.* and *Pul.* 158.

guish the present case from any case in which the constable goes out of the county for which the warrant is made.*

Lord ELLENBOROUGH, C. J. "The constable is not justified by this warrant, because he does not act in obedience to it. The warrant directs him to act within the county, and he does an act out of the county. If the justice had described the house locally, then he might have been made the *defendant*, and not the constable, because then the constable would be directed to do a particular act not within his authority; but here he directs the constable to act only within the county, which is within his jurisdiction. This was not a mistake of the magistrate, but of the constable."

GROSE J. "In this case the material question is, whether the magistrate ordered the constable to go out of his jurisdiction? and it does not appear that he did so in the warrant; then are we not to hear, by evidence of the fact, whether or not the constable did go beyond his jurisdiction. The case should have been heard further, to know whether the place was within the lower half-hundred of *Gillingham*."

LAWRENCE, J. "The question is, as my brother GROSE has stated it, whether the *plaintiff* ought not to have been permitted to go on to shew that the *defendant* has not done that which was *within* the warrant. The warrant does not shew that the constable was directed to do that which he ought not to do. It does not state where he is to levy the money, but only that he is to execute the

* In the course of the argument, the following authorities were cited, and incidentally argued upon; 2 *Strange*, 710; *Blacken* v. *Kemp*, 1 *H. Bl.* 15, *n.* and *Rex* v. *Chandler*, 1 Lord *Raym.* 546, to shew that if a justice of peace directs a warrant to any particular constable by name, he may execute it beyond the limits of his parish. But *quære*, if it must not be within the county?

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warrant within his jurisdiction. I think the case was stopped short before the evidence came to the true point."

LE BLANC, J. "This is a case in which there is a doubt as to the jurisdiction over the place in which the warrant was executed, and we have it not in evidence whether the place where the goods were taken was in the jurisdiction of the person executing the warrant. The complaint is that they were taken in the manor of *Brench*. If the *plaintiff* had been permitted to go on, he would have shown that the constable went to execute the warrant beyond the limits of the jurisdiction, in which he was directed to act. And if the warrant directs him to act in the half-hundred of *Gillingham*, and he goes out of the half-hundred of *Gillingham*, it is no authority for him."

RULE ABSOLUTE.

MASON *versus* JOSEPH.—*June* 4.

Semble. *Under a power of attorney by* A. *to* B. "*to underwrite any policy of insurance not exceeding* 100*l. and to subscribe the same in his* (A.'s) *name, and to settle and adjust losses, &c.*" *Although* B. *cannot delegate his whole authority to another, yet, having signed a* slip *for a policy of insurance, the signature of his clerk for him, and in his absence, to a policy made in pursuance thereof, is a good execution of the power, that being only a ministerial act, which he might authorize another to do for him; but he must himself execute the power, in all matters in which his judgment and discretion are requisite. In the present case, the policy, after it was so executed by the clerk for* B. *having been shewn to* A. *who then offered terms of settlement, it was held, that* A. *had adopted the act of* C.

MASON versus JOSEPH.

THIS was an action to recover 100*l.* upon a policy of insurance tried at the last Lent assizes at *York*, be-

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fore CHAMBRE, J. The *plaintiff* proved by the evidence of his broker an adjustment of the loss with one *J. Markham*, the agent of the *defendant* appointed under a power of attorney. The same broker afterwards met the *defendant* in *London*, and shewed him the policy subscribed in the manner after-mentioned, and an action having been commenced, the *defendant* offered to give a bill for the money due on the policy, but refused to pay the costs. The insurance was effected in the following manner: the *defendant*, who resided in *London*, gave a power of attorney to one *W. Markham*, empowering him "to the best of his discretion, knowledge, and judgment, to underwrite any policy of insurance, not exceeding one hundred pounds; and for that purpose, to subscribe such policy, for him and in his name, and also to examine, settle, and write off all such sum and sums of money as may be due on *such* policies." *Markham* accordingly, when the insurance was proposed to him, signed a slip, which however was not preserved, nor was produced at the trial, and wrote upon it "100. *J. M.* for *A. J.*" the *defendant*. When the policy was made out in form, *Markham* was absent from home, and it was signed by a clerk of *Markham*'s of the name of *Bean*, for *A. Joseph*, he, *Bean*, being generally authorized to sign policies, and transact other business for *Markham*, in his absense. But afterwards the adjustment of the loss was signed by *Markham* himself. Upon this evidence it was objected that a person appointed by deed to act for another could not delegate his authority to a third person; and that the adjustment of the loss by *Markham* would not make valid the policy signed by *Bean*, because his authority to adjust losses was confined to losses on such policies as should be signed by him; and also that the subsequent offer of a bill by the *defendant*, being made before he was proved to have had notice of the manner in which the policy was executed, was not sufficient to charge him with it. And of this opinion was the learned judge; and therefore although the *plaintiff* offered to produce evidence of a custom in *Hull*, and also in *London*, to execute poli-

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cies by the *agents* for others, and by their clerks, as in this case, it was rejected, and the learned judge directed a *non-suit*.

And now upon a rule to shew cause why there should not be a new trial,

SCARLETT, for the *defendant*, shewed cause, and contended that there could be no question but that an agent appointed by deed could not delegate his authority, nor that a custom though it might be admitted, would be unavailable in the present case, and therefore proceeded to argue that the *defendant*, when he offered the bill, had not notice of the manner in which the policy was signed.

Lord ELLENBOROUGH, C. J. "If he had seen the policy, he must have seen another name than that of *Markham* to it. The *risk* was taken and the slip signed by *Markham*, the policy by *Bean*, and the adjustment by *Markham*. It seems, therefore, that there was a waiver of any objection to the signature of *Bean*. I think also that the cause might have gone a little further. It is true, an attorney, appointed by deed, cannot delegate his authority to a third person. He must exercise his *own* judgment on the principal subject, for the purpose of which he is appointed; but as to any *mere ministerial act*, it is not necessary that he should do it in person, if he direct it to be done, or, upon a full knowledge of it, adopt it. Suppose, for instance, he had got the gout in his hands, and could not actually sign the policy himself, he might have authorized another to sign the policy for him. This is somewhat similar to the assignment of a bail bond by the sheriff, which is not done by himself nor by the under-sheriff, but often by a clerk. But it is sufficient that the *defendant* saw the policy with the name of *Robert Bean* subscribed to it for *him*. He then offers to pay the 100*l*. but disputes about the costs; and is not this the same as a *tender*, even if it was not necessary to go further in the cause?"

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MASON versus OSLER.

GROSE, J. "At any rate, I think it was for the jury to say, whether that which was done by the *defendant* did not amount to an adoption of the policy, subscribed, as it appears to have been, by *Bean*."

LAWRENCE, J. "I think there is sufficient to shew that the *defendant* had adopted the signature of *Bean*, as equivalent to his own, for he finds fault with the agent *Markham*, for not having settled the debt before, and he offers a bill for the debt, but refuses to pay the costs, though he afterwards changes his mind, and defends the action." RULE ABSOLUTE.

MADGE (Executor of THOMAS) *versus* FEAR.—*June* 4.

In assumpsit by an executor for goods sold and delivered, the delivery was proved by one witness, but he also swore that he was partner with the deceased, notwithstanding, from a paper written by himself, the debt appeared to have been due only to the deceased; the jury found a verdict for the plaintiff *for* 8*l.* 14*s. and, notwithstanding the smallness of the debt, the verdict was set aside.*

Semble. *The jury cannot give credit to part of the testimony of a witness and reject part.*

MADGE (Executor of THOMAS) versus FEAR.

THIS was an action to recover 8l. 14s. for goods sold and delivered, and for work and labour as a *taylor*, tried before HOTHAM, B. at *Kingston* Lent assizes, 1804. The *plaintiff* called, as the first witness, *Theophilus Thomas*, the son of the deceased, who proved the work done and the goods delivered; but said, that he was at the time in partnership with his mother, Mrs. *Venus Thomas*, the deceased. Upon this, GARROW, for the *plaintiff*, put into his hands an account of debts due to Mrs. *V.*

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Thomas, made out by the witness himself, in which account this debt was stated, amongst others, as due to Mrs. *V. Thomas*. The *plaintiff* then called the sister of the last witness, but she being entitled to a legacy, which was then due, and an objection being made to her testimony, she was rejected: and he then called one *T. Barber*, a button-maker, who dealt with the deceased, and he proved that the witness, *Thomas*, after the time of the delivery of the goods, was recommended to him as a customer by Mrs. *V. Thomas*, when she was about to quit business, upon which he dealt with, and trusted *Thomas* the son; but that, up to that time, he dealt with Mrs. *Thomas*, and she said he was her journeyman only, and he never considered him as a partner. ESPINASSE objected that there was no evidence for the *plaintiff* of any debt due, but, on the contrary, that the evidence was of a contract with *Theophilus* and *Venus Thomas*, and that *Theophilus Thomas* should have brought the action; and of this opinion was the learned Judge: but GARROW requesting to go to the jury, ESPINASSE addressed them at length upon the evidence, and they returned a verdict for the *plaintiff*; and, upon being requested by the learned Judge, to reconsider it, they then said that they gave credit to the papers proved by *Theophilus Thomas*, but not to the other part of his testimony, and there was a verdict for the *plaintiff*.

And now, ESPINASSE having obtained a rule to shew cause why there should not be a new trial,

THE COURT, upon reading the learned Judge's report, said, that there must be a new trial, because there was no evidence of the delivery of the goods, without believing the evidence of *Theophilus Thomas*, which must be received or rejected altogether. But had there been other evidence of the delivery of the goods, his testimony might have been rejected, and then the verdict might have stood.

RULE ABSOLUTE.

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Osborne *versus* Harpur.—*June* 4.

An action being brought upon a joint contract against A. B. *and* C. *two of them,* A. *and* B. *paid the damages and costs: and afterwards* A. *brought his action against* C. *for his share paid for his use: Held, that the damages, having been paid by* A. *and* B. *by means of their joint bill of exchange on a banker, this was a payment by them out of a joint fund between them, and that the action against* C. *should have been in both their names.* Semble, *it would have been otherwise if the money had been paid by each out of his separate funds, there being at the time of the payment no general partnership between them.*

Osborne *versus* Harpur.

THE *plaintiff,* and the *defendant,* and a third party, had been in partnership; an action was brought against them all three for a joint cause of action, but at the time of commencing that action, the partnership was dissolved. *Harpur* pleaded bankruptcy, and the *plaintiff* in that action entered a *nolle prosequi* against him. It was stated by one of the counsel that he suffered judgment to go by default; but it could not clearly be collected whether it was so or not. There was a joint judgment against *Osborne* and the other partner, who afterwards paid the money in order to redeem themselves from an execution; and now *Osborne* brought his action against *Harpur* for money paid to his use. Upon these facts appearing at the trial, at the last Kent assizes at *Warwick,* the *plaintiff* was non-suited, on the ground that it was a joint payment by the *plaintiff* and the third partner, and that he ought to have been joined in the action.

In *Easter* Term, Vaughan, Serjeant, obtained a rule to shew cause why there should not be a new trial; and cited *Brand* and *Herbert* v. *Balcott** where "*A. B.* and *C.* being appointed assignees under a commission of

* 3 *Bos.* and *Pul.* 235.

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OSBORNE *versus* HARPUR.

bankrupt, and having acted as such, *A.* and *B.* had paid each half of his bill to the solicitor, it was held that *A.* and *B.* could not maintain a joint action against *C.* for his proportion of the money paid, but should each have brought a separate action."

WOOD and CLARKE, *N. G.* for the *defendant* shewed cause, and stated that there were no cases directly in point; but they cited *Noy* 190; and also *Ward and others* v. *Brampton*,* where two churchwardens brought a *mandamus* to be admitted to their office as churchwarden, and the surrogate having made a false return, they brought a joint action against him for damages, and upon demurrer the court gave judgment for the *plaintiffs*, saying, the *mandamus* and the whole prosecution and charge thereof were joint. They contended therefore that in this case the judgment being against two of the partners jointly, the three partners having been previously sued jointly, the two must now sue the third jointly to recover the proportion of the debt paid for him.

LE BLANC, J. having asked whether the parties had at the time of the execution any joint funds, it was answered that they had not.

WOOD. "As between the three *defendants* to the original suit, they had been in partnership, but had all, at the time of the suit, dissolved partnership, and the action being brought by the creditor of the partnership, the *defendant* pleaded bankruptcy, and was discharged as against the creditor. But the *plaintiff*, and the other partner, though there was a dissolution of the partnership, were entitled to recover against him the money paid for his use, it being paid since his bankruptcy; and as the money was paid jointly upon a joint execution, they must bring the action jointly."

* 3 *Levinz*, 362.

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OSBORNE versus HARPER.

LAWRENCE J. "Suppose the execution had been only against one of them, must the other have been joined in the action?"

Lord ELLENBOROUGH, C. J. "The case in *Noy*, is of a proceeding upon a judgment which must follow the entry of the judgment, and in the case in *Levinz*, the parties were overseers and *quasi* a corporation."

LAWRENCE, J. "That was also on a demurrer. To adopt the expression used in one of the cases, there the action springs out of a joint action; here, on the contrary, it springs out of a *payment*, which may be *several* in its nature; and not having joint funds, they could not pay jointly."

WOOD then cited *Graham* v. *Robertson*.*

LAWRENCE J. "The action there was held to be wrongly commenced, because it should have been either by all the partners jointly or by each separately."

Lord ELLENBOROUGH, C. J. "The question will ultimately come to this single point, whether the parties actually paid the money out of a joint fund?"

CLARKE. "I submit that this was a joint payment by the hands of the attorney, for both parties were liable to him. And this distinguishes the present case from the case of *Brand* v. *Bolcott*,† for there it is expressly stated that each paid separately; but here they constitute a joint fund for the purpose of paying the money. In that case it by no means followed that the transaction of paying the costs made the assignees partners. Suppose the parties here had been taken in execution, they would have

* 2 Term Rep. 282. † 3 *Bos.* and *Pul.*

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OSBORNE versus HARPUR.

had a joint action for money paid, for the being taken in execution is equivalent to payment."

LAWRENCE, J. "Not unless they paid the money; otherwise it is only a discharge as to themselves."

Lord ELLENBOROUGH, C. J. "Though the parties are jointly liable to their attorney who paid the money for them, yet they may not be partners in a joint claim upon the other partner. As in the case of trespassers, they would be liable to the attorney jointly, but not to the *plaintiff*; nor would one of them, who had paid the whole damages, be entitled to contribution from the others."

VAUGHAN, Serj. for the *plaintiff*. "The action can only be joint where the remedy survives to the one party in case the other dies; but here it cannot be contended that if one of the parties were to die, the action would survive to the other; but I admit, that if there was a joint stock between the parties, it would be a joint cause of action; but here there is none.

Lord ELLENBOROUGH, C. J. "It does not appear, upon the judge's report, exactly in what manner the money was paid; whether it was money advanced by the attorney for both, or paid by them to him first, in order to be paid over afterwards. If it was a joint payment by the attorney, the debt *may* be joint. If the parties contributed the money each separately, and the attorney then paid it, that circumstance would put an end to the question. As a precedent, it is very material that this fact should be ascertained before we decide upon the case."

It was therefore ordered to stand over, and that in the mean time, an affidavit should be obtained from the attorney, to state how and when he paid the money, and whether he received it from the parties and paid it over, or paid the money first, and then looked to them to be re-

paid. Accordingly, on a subsequent day, the 11th of *June*, VAUGHAN, Serj. stated that the attorney had made an affidavit stating that he paid a part of the money himself, and that he paid the residue by means of a joint note by the two parties on a banker in *Birmingham*.

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OSBORNE *versus* HARPUR.

BY THE COURT. "This is a *joint* fund, and the rule must be discharged."

FETIL *versus* SUTTON.—*June* 4.

A. compounded with his creditors, and paid B. *one of his creditors,* 7*s. in the pound on his whole debt, for which he gave a receipt in full: A., however, promised to pay the residue when he should be able:* B. *brought* assumpsit *against* A. *for the original cause of action, and gave proof of his ability to pay: Held, that this composition being only in consideration of a less sum, was not such a payment in satisfaction as to extinguish the original debt, and therefore that the* plaintiff *need not be put to declare upon the special agreement made subsequently.*

FETIL *versus* SUTTON.

THIS was an action of assumpsit to recover 50*l.* for goods sold and delivered, and upon the common money counts. At the trial at *Chelmsford*, at the last Lent assizes, the *plaintiff* proved the original debt. On the part of the *defendant*, it was proved that he had compounded with his creditors, and paid 7*s.* in the pound, upon which occasion the *plaintiff* had given a receipt, dated *March* 10, 1802, for 17*l.* 10*s.* being the amount of the said composition, which receipt concluded with the following words—"which I acknowledge to be in full for all demands, from the beginning of the world to this day." The *plaintiff*, however, rebutted this, by proving a subsequent promise to pay the residue whenever he should be able, and also gave evidence of the *defendant*'s ability.

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The *defendant*'s counsel insisted that either this receipt was a discharge, or that the action should not have been for goods sold and delivered, but upon the new and subsequent promise, in *special assumpsit*; on which ground there was a verdict for the *defendant*.

And now a rule having been obtained to shew cause why there should not be a new trial,

BEST, Serj. for the *defendant*, shewed cause, and insisted upon the grounds taken at the trial, and cited *Buller's Ni. Pr.* 123,* to shew that after an agreement and satisfaction, no action would lie upon the former ground of action. He also cited the case of a horse being given and accepted in satisfaction of a debt for money.

Lord ELLENBOROUGH, C. J. "How do you make out that the receipt of 17*l.* 10*s.* is a good discharge for a debt of 50*l.* In order to bring your cases to the same point, you must shew that the payment of 17*l.* 10*s.* is as good a discharge and extinguishment of the debt as the giving of the *horse* was in the other case. The case of *Heathcote* v. *Crookshanks*, † is directly against you, and that was decided on the authority of the case of *Cumber* v. *Wane* ‡ It is said indeed that there are cases in which that was over-ruled, but I cannot find them. *Howard* v. *Hardcastle*, *H.* 26 *Geo.* III. §, is cited as an authority; but I have looked for a note of that case, and cannot find it."

LAWRENCE, J. "I wish you would establish that pay-

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* Cites *Knight* and *Cox*, per *Pemberton*, Ch. J. in *Sussex*, 1602.

† 2 Term Rep. 42. ‡ 1 *Str.* 426.

§ Referred to by *Buller*, J. in the case of *Heathcote* v. *Crookshanks*, where he said that, in that case, in which *Cumber* v. *Wane*, was denied to be law, the party actually accepted.

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ment of a less sum, without any thing else, can be an extinguishment of a debt for a greater sum."

LE BLANC, J. "It is expressly laid down in *Cumber* v. *Wane*, that the giving of a note for 5l. cannot be pleaded as a satisfaction for 15l. In *Heathcote* v. *Crookshanks*, there is a case referred to, in 2 *Leonard*, 214, that it is a good plea, in an action of assumpsit, that after the promise made, the *plaintiff* discharged the *defendant* from it, so that payment of a less sum may go in discharge of a greater, but that, I take it, is before the promise is broken. The sum here is not of sufficient magnitude to have the case put in another form."

SHEPHERD, Serj. *for the plaintiffs*, referred shortly to the case of *Heathcote* v. *Crookshanks*.

Lord ELLENBOROUGH, C. J. "We have here, in the case of *Cumber* v. *Wane*, an express authority that a less sum cannot go in extinguishment of a greater; and the same point is determined in *Adams* v. *Taplin*."* Upon this ground the court made the

RULE ABSOLUTE.

PETO (qui tam) *versus* HAGUE.—*June 5.*

To found an action against the vendor of coals, not having obtained a coal meter's ticket, for a penalty of 50*l. on the* 19*th* Geo. II. *c.* 35, *s.* 11, *the* plaintiff *need not proceed to convict the offender before a justice of*

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* 4 *Mod.* 138.

1804.

Pain (q. t.) versus Hague.

the peace, though that clause of the act contains the words being thereof convicted by the oath of two credible witnesses before one or more justices, *&c. For by the 21st clause, which enacts, that all penalties above 5l. shall be recovered by action in the superior courts, those words must be taken to apply only to the case of the 5l. penalty upon the carter, imposed by the same 11th clause.*

Semble. *A* coal waggon *is within the clause, though the act contains only the words* cart *or* carts.

ACTION for several penalties of 50l. each, on the 19 *Geo.* II. c. 35, s. 11, for not having a coal-meter's ticket with the waggon in which the coals were carried; verdict for the *plaintiff*.

GARROW, *for the defendant*, moved for a new trial, or an arrest of judgment, as the court should see fit, on the following ground. The 11th clause in the statute on which this action was founded, provides that "If any *cart* or *carts* loaded, or which shall be sent or driven from any wharf, warehouse, or place, within the city and liberties of *Westminster*, &c. without first having obtained such ticket as aforesaid, then, and in every such case the vendor of the said coals, and the driver or carter of such cart, being convicted thereof by the oaths of two or more credible witnesses, before one or more of his majesty's justices of the peace, &c. shall, for every offence, forfeit and pay the respective sums following, to wit, the vendor of such coals the sum of 50l. and the driver of such cart the sum of 5l.;" but by a subsequent clause, namely, the 21st "the aforesaid several forfeitures and penalties imposed and to be incurred by virtue of or under this act shall be recovered, &c in the manner following, that is to say, such and so many of the said forfeitures and penalties as do and shall exceed the sum of 5l. by action of debt, &c. in any of his majesty's courts of record at *Westminster*; and all other the aforesaid penalties and forfeitures, shall be recovered by way of complaint made *unto* any one or more justice or justices," &c. He, therefore, contended, that either the *plaintiff* should have proceeded to recover the penalty before the magistrate

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below, or that, if he is permitted to sue in the court of *King's Bench*, under the last clause, yet it is a condition precedent to that action, that he should first proceed to obtain a conviction before a magistrate, and that the declaration should have stated that the *defendant* was thereof convicted before a magistrate. He cited 3 Term Rep. 422, where Lord *Kenyon* states, that it is more convenient for a *defendant* to be prosecuted for a penalty before a magistrate, than to be sued in the superior courts; and to a question from the court, whether it was ever known in any case, to be necessary to proceed before a magistrate to establish evidence on which to found an action of debt for a penalty, he said that probably it might have occurred to the legislature that it was very convenient to have the fact, concerning the ticket being with the cart, ascertained immediately, and that it was therefore required that the party should go immediately before a magistrate.

Lord ELLENBOROUGH, C. J. "I can easily see how the obscurity in these clauses has arisen. The legislature has put in a new penal clause, which, instead of coming in after the others, comes in before, but was intended to be the last clause in the statute. The whole objection proceeds upon the mistake that it is absolutely compulsory upon the party to go before a magistrate. Transpose the other clause, and it will be perfectly clear. The *defendant* must bring his writ of error."

LE BLANC, J. "If it is necessary to proceed to conviction before a magistrate, there may be an appeal to the quarter sessions, and there is then a clause of limitation."*

RULE NISI REFUSED.

* The 22d section gives an appeal to the next general quarter sessions. The 23d section takes away the writ of *certiorari*.

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GARROW stated that an objection was taken, at the trial, that the coals were stated in the declaration to be loaded in a *waggon*, whereas the word *waggon* was not in the act. But this objection he now abandoned.

THOMAS DORRIENS *versus* HUTCHINSON.—*June 5.*

Action for not accepting stock;—The plaintiff *tendered the stock, on the day agreed on for making the transfer, and the* defendant *refused to accept it; Held, that the* plaintiff *need not wait till the end of that day, but may sell the stock to a third person immediately after the tender and refusal.*

DORRIENS *versus* HUTCHINSON.

IN an action for not accepting stock tried at *Guildhall* in the sittings after *Easter* term, ERSKINE moved for a new trial, and stated nearly as follows:—The declaration stated "that the *plaintiff*, at the time of making the contract, was possessed of 10,000l. 3 per cent consols; and that on the 5th of *May*, 1803, it was contracted and agreed between the *plaintiff* and the *defendant*, that the *plaintiff* should, on the 10th day of *May*, then next, transfer the aforesaid 10,000l. 3 per cent. consols to the *defendant*, and the *defendant* should then and there accept the said stock and pay for the same at the rate of 75l. per cent; that he, the *plaintiff*, was on the 10th day of *May* ready and willing, and did on the said 10th day of *May* offer to transfer the said sum of 10,000l. to the *defendant*, and then and there requested the *defendant* to accept the same, but the *defendant* did not nor would then accept the said 10,000l. although so requested, but then and there wholly refused so to do." The facts proved by the broker who made the bargain and sold the stock, were in substance as follows:—*Thomas Dorriens* had on that day, the 5th of *May*, 18,575l. 3 per cent consols, out of which he trans-

ferred, on the 10th of *May*, 10,000l. as stated in the declaration, and he also sold 5000l. of it to a person of the name of *Powel*. But originally 15,000l. were sold to *Joshua Hutchinson*, the *defendant*. He received his orders from *Thomas Dorriens*, and there was no evidence of any stock in the hands of *George Dorriens*, the brother, to whom 5000l. of it was afterwards ascribed, as being the seller of that sum. Nor was there any evidence of any authority from *George Dorriens* to *Thomas Dorriens* to sell. But he said, that after having made the contract with the *defendant*, without mentioning the seller's name, he met *Thomas Dorriens* alone, and he desired him to put 10,000l. of it to the account of himself, and 5,000l. to the account of *George Dorriens*, although he, the broker, had actually made an undivided contract for the 15,000l. He then saw the *defendant*; and offered to transfer the 15,000l. but he said he would abide by the determination of the *stock exchange*. Having made this offer, about 12 o'clock, he immediately sold the stock without waiting till the end of the day, and it sold for only 64l. per cent. Lord ELLENBOROUGH, C. J. at the trial, was struck with the difficulty of the case in this respect; viz. how the 15,000l. originally sold by the broker could be split into two parts, and be ascribed to two different persons as sellers. It was suggested that a case should be made, but a difficulty occurred in settling it. The broker was agent for the one and the other of the parties, and he was asked the question, whether he had before that time received orders of this kind, and whether on selling stock in this way, when he had so ascribed it to *George Dorriens*, he had assented to it. He answered in the affirmative.

Lord ELLENBOROUGH, C. J. "Nothing occurred at the trial to make this appear an after-thought."

ERSKINE. "*Thomas Dorriens* directed the broker to sell 15,000l. generally, and he might have sold it in as many contracts as he pleased, and they would be each of them

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valid. But then my difficulty is this; when the broker sells 15,000l. in one contract, the purchaser is liable to one action only for the breach of the contract; but by the subsequent transaction, he is made a purchaser of two distinct quantities of stock, upon two distinct contracts, and liable to two actions instead of one. The broker, it is true, does not name his principal at the time, but he must afterwards name the principal who actually employed him. He must either stand in the place of the principal himself, or, if not, must be a faithful witness to represent the truth of the transaction. But in fact, *Thomas Dorriens* did not say 'Sell, 5,000l. of my stock to one, and 10,000l. to another;' but, finding that he had made a contract for 20,000l. stock, and when the transfer was to be made he could not transfer the whole, he altered his orders to the broker."—ERSKINE, therefore, contended that the contract was not proved as laid in the declaration; and then argued further that the *defendant* had the whole of the 10th day of *May* for performing the contract, and that the *plaintiff* ought not to have resold the stock until the expiration of the whole time within which the *defendant* was bound to accept it.

Lord ELLENBOROUGH, C. J. "He has not the whole of the 10th of *May*, when there is an express request and refusal, during the early part of that day, to accept the stock."

ERSKINE. "I do not require that the *plaintiff* should ask the *defendant* again, after the first refusal, but still I submit that he should keep the stock the whole of the day, and not incapacitate himself from performing the contract, on his part, if he should be required, at a subsequent time of the day."

Lord ELLENBOROUGH, C. J. (after reading part of the broker's evidence to prove a positive refusal to accept at twelve o'clock on the 10th of *May*) "The answer of the *defendant* to the broker's offer to transfer was a dispensa-

tion from all necessity of any further waiting. An absolute refusal given at any time of the day, is a refusal at the end of the day. As to the other ground, all the great contracts which are made in this capital would be bad, if what is insisted upon here was strictly required. The broker never mentions the name of his principal. The broker here deals with 15,000l. at first, and 15,000l. he had of *Thomas Dorriens*, originally. He says, in his evidence, he thinks *George* was by at the time, but he will not swear positively. But the 15,000l. which was sold to the *defendant* by *Thomas Dorriens* he always had. The broker comes to him and says, 'how shall I ascribe it?' and he directs him how to do it: there is nothing in this which can affect the contract. I did not communicate with the respectable persons who sat by me, till after the verdict; but they said that the bargains could not be made unless this was permitted. These were the persons actually holding the stock at the time when the transfer was made, and that seems sufficient to enable them to bring their actions upon the statute of the 7 *Geo.* II. c. 8."

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DORRIENS *versus* HUTCHINSON.

RULE NISI REFUSED.

BENTON *versus* PRAED. *June* 7.

In 3 penal actions for bribery by the same plaintiff, *against the same* defendant, *the court refused to consolidate them, there being forty instances of bribery declared upon in each action. In penal actions the court will rather require that the trial of each offence should be separated as much as possible, for the convenience of trial. Where there are actions in this court, and also in another court, between the same parties, this court will not impose terms concerning the actions in this court, in order to compel any thing to be done in the other actions; but application must be made to the court where they are brought.*

CONST moved, on the 1st day of the term, to consolidate the declarations in several causes, there being three

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actions in this court, between the same *plaintiff* and the same *defendant*, for penalties, for bribery committed at the election for Aylesbury, and also some other actions in the court of exchequer. The court then granted him a rule to shew cause, so far as respected the actions in this court only, but refused to interfere, with respect to the actions in the court of exchequer, even by imposing terms, as to the actions in this court, in order to compel any thing to be done in the court of exchequer.

ERSKINE now shewed cause, and stated that there were forty-one different persons bribed, and that if the three actions were consolidated, the one hundred and twenty cases would be joined in one action.

Lord ELLENBOROUGH, C. J. "In criminal cases the object is always to prevent cases that are distinct from being blended together. If there is any delay on the part of the *plaintiff*, or any vexation, there is a proper remedy. All cases of consolidation stand on the footing of convenience. It may be convenient, in cases of assumpsit, to unite the different actions; but in this case, where there are forty penalties in each action, it appears that it would be doing injustice. The joining of 120 cases of bribery in one action, would cast upon the jury and the judge a labour which would be too much for the faculties of man; so that, if the actions had been joined, we should rather have been inclined to have disjoined them."

LAWRENCE, J. "The *defendant* cannot have to complain of any vexation, if he has committed bribery in as many cases as he is charged with."

RULE DISCHARGED.

ANONYMOUS.—*June* 7. 1804.

A Bill of Middlesex, returnable on Monday next after the morrow of the holy Trinity, was held irregular; but the rule to set aside the proceedings was enlarged, for the party to amend, upon payment of costs, and also upon specifying the amendments, in the rule nisi; *notwithstanding the* defendant *was in custody.*

MARRYATT shewed cause against a rule obtained by NOLAN, to shew cause why the proceedings should not be set aside for irregularity, in the process. The *defendant* was arrested on the 31st of *May* on a bill of *Middlesex* returnable "*on Monday next after the morrow of the holy Trinity,*" whereas the last return before *Monday* the 4th of *June*, which was the day meant, was the *octave of the Holy Trinity*, and it should have been "on Monday next after eight days of the holy Trinity." ANONYMOUS.

Lord ELLENBOROUGH, C. J. "If the writ had said it will be the 22d Monday in the year, the return would have been quite as good as this. When the proceedings are by bill, the day of the week is always stated with reference to the last return."

MARRYATT then prayed leave to amend, and that the rule might be enlarged; which was granted, notwithstanding the *defendant* was in custody. The *plaintiff* was, however, ordered to specify his amendment in the rule *nisi* to be drawn up by him, and to pay costs.

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Where a cause is referred to an arbitrator, and the costs are to abide the event, and the arbitrator awards a specific performance of something to be done, which proves that the event, in fact, is in favour of the plaintiff, *he is entitled to costs; although the arbitrator does not award a verdict to be entered in form. As, where in an action of trover for corn the arbitrator, instead of awarding damages and a verdict, awarded that the* plaintiff *should have a right of entering the* defendant's *barn, &c.—N. B. It seems, in this case, the costs were to abide the event of the award, not "the event of the cause."*

ANONYMOUS. ON a rule to shew cause why the master should not tax the costs for the *plaintiff*, &c. it appeared that an action of trover for corn, &c. had been referred to an arbitrator, with an agreement that the costs of the action should abide the event. The arbitrator instead of awarding a verdict to be entered for the *plaintiff*, awarded to him a right of coming into a certain barn to thrash his corn there, and directed that the incoming tenant should prepare the barns for the outgoing tenant, the *plaintiff*, and permit him to thrash out his corn there: but he had omitted to give the *plaintiff* his costs, and direct a verdict to be entered. And it was now contended for the *plaintiff* that, although this was an award of a thing to be performed by the *defendant*, instead of giving formally a verdict to be entered in the action, yet the *event* being substantially in his favour, the *plaintiff* was entitled to his costs: and of that opinion was the COURT; and LE BLANC, J. observed, that it was agreed that the costs were to abide the "event of the award," and not "of the action." And upon 3 T. Rep. 138, being cited for the *defendant*, LAWRENCE, J. said, "that was a case in which the *defendant* was not liable to costs at all."

RULE ABSOLUTE TO TAX THE PLAINTIFF HIS COSTS.

ANONYMOUS.—*June* 18. 1804.

Where the rule to return a writ expires in vacation, the sheriff has till the next term to return it. Such a return before the sitting of the court on the 1st day of the subsequent term was held good. Q. Whether he has not three days in that term?

ON a rule to shew cause why an attachment against the sheriff of ———, for not returning a writ of *ffi. fa.* should not be set aside for irregularity, it appeared that the writ of *ffi. fa.* was issued in *Easter* term last, returnable on Saturday the 12th of *May*, and on the last day of the term, *Monday* the 14th of *May*, the *plaintiff* obtained a rule to return the writ, which expired in six days, and with which the sheriff was duly served. This rule expiring in vacation, the sheriff did not actually return the writ till the first day of this term; but, on that day, and before the sitting of the court, he filed his return. ANONYMOUS.

ERSKINE and T. W. CARR contended, that the sheriff ought to return the writ on the day mentioned in the rule; and CARR cited the rule of the 32 *Geo.* III. by which it is ordered, that "in future all writs shall be returned on the day on which the rule to return the writ expires, and if not, an attachment may issue on the next day," and he said that the rule expiring in vacation would be no excuse for not obeying it, for he might return it as well in vacation as in term, the *treasury chamber* being not in fact shut; for, though the clerks would not receive the return upon the ordinary fee, yet they would file it for a fee of five shillings and six pence, even during vacation. That the poundage to the sheriff was paid in consideration of the expences he might be put to in the return, &c. That, if the writ were not to be returned till the next term, because the rule expired in

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vacation, it would be of little advantage to a *plaintiff* to get execution towards the end of *Trinity term*, as the sheriff might delay returning his writ the whole of the long vacation.

Lord ELLENBOROUGH, C. J. "The rule of court cited by the counsel for the *plaintiff* applies only to a case in which the rule expires in term time, for it says that the party may move for an attachment 'the next day;' but he could not do that in vacation."

LAWRENCE, J. "The Master says it is not the practice to return the writs in vacation, and he has furnished me with a note of Mr. *Benton's*, which says, that 'where the writ is returnable at the end of the term and the sheriff is ruled, and there remain only three days of the term, he has three days of the next term.' But it is not necessary to inquire whether he has three days in the next term or not, with respect to this case, for here it was filed before the sitting of the court."

ATTACHMENT DISCHARGED.

CLARKE *versus* FISHER.—*June* 18.

Where there has been an arrest, and afterwards a payment of money into court, by the defendant, *of a less sum than the sum for which he was held to bail, and the* plaintiff *has taken it out and discontinued, the* plaintiff *is still entitled to his costs, notwithstanding the act* 43 Geo. III. c. 46; *unless the* defendant *can shew,* aliunde, *that the* plaintiff *had no probable cause for arresting him for that amount.*

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ERSKINE, *for the plaintiff*, shewed cause against a rule to shew cause why the *plaintiff* should not be prevented from entering up judgment and taking out execution for his costs, under the statute 43 *Geo.* III. c. 46, s. 3, and stated nearly as follows:—"The arrest was originally for ninety-five pounds. The *defendant*, in

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Easter term, justified bail, paid 75l. into court, and pleaded a set-off, upon which he demanded 25l. 4s. 2d. The *plaintiff* did not arrest for his whole debt, which would have amounted to 116l. 16. but deducted the real amount of the *defendant*'s set-off, and arrested him for the residue. Beyond the sum which the *defendant* paid into court, the *plaintiff* had a further demand of 18l. and a fraction, upon a bill of exchange due in *October* last. He, however, countermanded his notice of trial, and his motive for so doing was, that the accounts were settled between the *plaintiff* and the *defendant* alone, and the bill of 18l. was an accommodation bill, which he had paid for the *defendant*; he therefore was advised to take the 74l. out of court and be contented."

Upon this statement, he contended that the *plaintiff* had probable cause for arresting the *defendant* for the amount indorsed on the writ; but he also relied on another ground, namely, That the rule for payment of money into court was conclusive against the present motion. That rule was, "that, upon payment of 74l. into court, and *upon the plaintiff's taking out that sum with the costs*, the cause should be stayed." After that rule, therefore, the present rule, he said, could not be sustained. He cited *Stodhart* v. *Johnson*,* where, upon payment of money into court, and a juror being afterwards withdrawn, it was held that the *defendant* was not entitled to the costs up to the time of paying the money into court; and *Buller* J. says, "the form of the rule is decisive of the question. It is part of the rule that if the party should take the money out of court, the same should be struck out of the record," &c.

GARROW, *for the defendant*. "The object of the act of parliament was to give the court a discretion where there is a vexatious proceeding, and although the *onus* may be

* 3 Term Rep. 657.

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taken to lie on the *defendant*, to shew the proceedings to be vexatious, yet the act must be taken to extend to cases where there has not been a trial. The object of it must have been that, in whatsoever manner the suit is ended, if it be afterwards made out that there was not reasonable or probable cause for the arrest, for the amount indorsed on the writ, the court shall have jurisdiction to deprive the *plaintiff* of his costs. In this case the *plaintiff*, by taking the money out of court, has become his own judge, and decided against himself, that he had no reasonable or probable cause. As to the form of the rule, for payment of money into court, precluding the *defendant* from the benefit of this rule, he could not at the time of paying the money into court be certain that the *plaintiff* would take it out, and the court would not have permitted him to have a rule in any other form; for they would not listen to a rule to pay money into court, and upon taking the same out that the *plaintiff* should pay the costs according to the late act of parliament."

Lord ELLENBOROUGH, C. J. "Do you mean to say that the taking of the money out of court is of itself conclusive evidence that the *plaintiff* has no right, or probable cause, to sue for more than the sum so taken out; would you say, that proof of that alone would be sufficient evidence, before a jury, that the *plaintiff* had maliciously held the *defendant* to bail? By that rule the question may be tried; since the act of parliament has substituted this proceeding instead of an action for a malicious holding to bail. Any other construction would make this act an enormous vexation to all suitors. There are many cases in which a *plaintiff* may arrest a *defendant* for money lent in confidence to him, which he may not be able to make out in evidence, so as to induce a jury to give him a verdict, to the whole amount of his demand. Here the *plaintiff* has given a very probable cause for his arresting the *defendant*, and I am of opinion that the word *recover* in the act of parliament must mean a recovery by law, particularly as the statute mentions taking out execution thereon."

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GROSE, J. "I do not think it necessary to decide what the word *recover* means, but I think it means what his lordship says."

LAWRENCE, J. "Without deciding what is the meaning of the word *recover*, used in the act of parliament, I think the *defendant* is not entitled to this rule. 'The rule for payment of money into court by the *defendant* is obtained upon payment of costs, and now he retracts, and says he will not pay costs,' His former rule is decisive against him."

LE BLANC, J. The *defendant* is not entitled to relief on either of the grounds. The payment of money into court is an indulgence to a *defendant* by allowing that mode of relief where he cannot plead a tender, and is therefore always upon payment of costs. The only evidence which he gives that this arrest is oppressive, is, that the *plaintiff* has taken the money out of court. But it would be very mischievous to say that, in all cases, that alone shall be evidence of a malicious arrest, because that would drive the *plaintiff* to go on in all cases, whether he would or not, and incur the hazard of further costs, in order to avoid the inconvenience of taking the money out of court."

RULE DISCHARGED.

LAMBE *versus* SIZEMAN.—*June* 18.

Where the drawer of an accommodation bill took usurious interest of the acceptor, under the false pretence that the person who afterwards discounted it (the first indorsee) required such interest, and there was a non-suit *in an action by the first indorsee against the acceptor, on the ground of usury, the court granted a new trial, in order that the jury might decide who was the original lender of the money, whether the drawer or the first indorsee.*

LAMBE *versus* SIZEMAN.

RULE obtained by GARROW calling on the *defendant* to shew cause why the *non-suit* should not be set

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aside and a new trial granted. Action of *assumpsit* on a bill of exchange by the indorsee against the acceptor, dated the 30th of *September*, 1803, at two months after date, for 50l. payable to the order of ——— *Burton*, tried before Lord ELLENBOROUGH, C. J. at *Guildhall*. The defence was that the transaction was usurious. The indorser, *Burton*, was called as a witness, and said "I received 50l. from *Lambe*, and he deducted no discount; I never discounted a bill before for *Sizeman*; I told *Sizeman* that I could not get the bill done without paying 50s. for the discount." Lord ELLENBOROUGH, C. J. on reading his report said, it appeared to him to be usury in the first *concoction* of the transaction, and the *plaintiff* was therefore *non-suited*."

GIBBS now shewed cause, and insisted that the evidence went to shew that *Burton* was the lender of the money to *Sizeman*, and that *Lambe* afterwards advanced the money to *Burton*. For, after *Burton* had got the bill, he went to *Lambe* to discount it, and what passed between *Lambe* and him could not affect the case.

GARROW, *for the plaintiff*. "As between *Burton* and *Sizeman*, it was a mere accommodation-bill for *Sizeman*; if it had been for the accommodation of *Burton*, he could not have been a witness."

GIBBS. "*Sizeman originally* receives only 47l. 10s. for a bill of 50l. at two months. This he receives from *Burton*, who is the drawer of the bill; *Sizeman* talks to *Burton* about the discount of 50s. and then the bill is drawn. The bill is drawn before the money is produced. This is a transaction entirely between *Burton* and *Sizeman*, and not between *Lambe* and *Sizeman*."

LAWRENCE, J. "It seems he got the money first for *Sizeman*, and having got it of *Lambe*, paid 47l. 10s. to *Sizeman*."

GIBBS. "I admit that if this had been the act of a

servant sent to get a bill discounted, and *Burton*, as a mere agent, had deducted the money, that would not have been usury."

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Lord ELLENBOROUGH, C. J. "A *surety* may be usurious before any money is lent. Is not this a security given in contemplation of an usurious contract?"

GIBBS. "That observation is peculiarly decisive. This bill is given to secure money to be lent on usury. It is originally given upon a contract, in which *Burton* says he cannot get the money without paying 50s. for it. This is the agreement on which the bill is delivered to *Burton*. He is the only person besides *Sizeman* at that time concerned in the transaction. As between *Burton* and *Sizeman*, *Burton* is the principal, and not merely an agent between him and *Lambe*."

LAWRENCE, J. "Of what principal sum is *Burton* the lender to *Sizeman*?"

Lord ELLENBOROUGH, C. J. "Is not that a fact which ought to have been left to the jury? If *Burton* was the lender to *Sizeman*, then it is certainly usury, and I still think that will be the effect of the evidence."

On this ground, therefore, the COURT made

THE RULE ABSOLUTE FOR A NEW TRIAL.

CHARNELEY *versus* WINSTANLEY and Wife.—*June* 7.

A. a feme sole, *covenanted with* B. *to abide the award of* C. *and, before the making of the award, married. When the award was afterwards made,* B. *brought covenant against the husband of* A. *jointly with* A. *and declared on a breach for* non-payment *of a sum awarded to be due*

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to him, and upon the general issue pleaded, had a verdict. Held, upon motion in arrest of judgment, that the intermarriage of A. *was a revocation of her submission, and therefore the award was void: but that the marriage itself was, for that reason, a breach of covenant; and therefore, it appearing on the face of the declaration, that the* defendant *married before the making of the award, it was sufficient after verdict, and the* plaintiff *accordingly had judgment.* Semble, *if the marriage had been with the consent of the* plaintiff, *the* defendants *should have pleaded it in bar.*

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THIS was an action of covenant against the *defendants* upon an indenture of covenant made with the wife of the first *defendant*, wherein she covenanted with the *plaintiff* mutually to abide and perform the award of a certain arbitrator therein named. The *defendants* pleaded *non est factum* &c. After a trial, on the *northern circuit*, and verdict for the *plaintiff*, the *defendants* moved in arrest of judgment, on the ground that the award declared upon was void, as the wife of the first *defendant* married between the making of the indenture of covenant and the making of the award, and the submission to arbitration was thereby revoked *White* v. *Gifford.**

TOPPING and SCARLET now shewed cause, and said that in Sir *William Jones* it appeared as an anonymous case, and that, although there were other authorities, yet it did not appear whether there was a submission by rule of court or in writing, the want of which might make a distinction between the cases. But they also contended that the marriage of the *defendant*'s wife, before the making of the award, was, in effect, a breach of the covenant. The breach assigned 'that she had not paid nor caused to be paid the money awarded or any part thereof; contrary to the said indenture and covenant.' The only question was, therefore, whether this could be shewn upon the

* Sir *W. Jones*, 388. 1 *Roll.* 331; 3 *Vin.* 434; see also 2 *Keble.* 865. *Saccum and Wife* v. *Norton and Wife.*

present declaration? for, though the marriage might make void the submission, and take away the power of the arbitrator, yet it did not affect the covenant. And they cited *Broke's* abridgment, title *arbitrament*, fo. 45, b. pl. 35.* and contended that, if the court could collect from the proceedings, that the wife, by her marriage incapacitated herself from performing the covenant, which she did by revoking the consent to submit to arbitration, that would be sufficient to support the verdict, on a motion in arrest of judgment.

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CHARNELEY *versus* WINSTANLEY and Wife.

Lord ELLENBOROUGH, C. J. "That a breach might have been assigned, I have no doubt; for you might have said 'she did not abide, perform, or obey the award of the said W——: but, on the contrary thereof, she married, and thereby prevented him from making any award in the premises."

LAWRENCE, J. "The objection is, that you have declared on a breach of the award; and yet have shewn the award to be a mere nullity: and you contend, not that the marriage is not a revocation of the submission to arbitration, but that, granting it to be so, the *wife* of the *defendant* has still broken her covenant."

PARKE and RICHARDSON, *contrà*. "If so, the *plaintiff* ought to have proceeded upon that breach of covenant expressly: but here he declares that 'after the making of the indenture, and after the intermarriage with the *defendant* and during the joint natural lives of the said *William* and *Frances*, the said *William* made his award, that she the said *Frances Winstanly* should pay, &c. it then states that she had assets, and that she did not pay or cause to be paid, the sum so awarded but therein wholly failed, and made default."

* See also *Vynior's* case, 8 *Co.* Rep. 82.

CHARMELEY versus WINSTANLEY and Wife.

Lord ELLENBOROUGH, C. J. "The question is, then, whether there is a sufficient allegation of the marriage before the making of the award; for, if there is, that will be sufficient after verdict."

PARKE and RICHARDSON. "They ought to have proceeded in the same manner as in *Vynior*'s case."*

LAWRENCE, J. "Your own argument is founded on this very ground, that she has not abided by her covenant, because she married and revoked her submission, and that they have shewn the marriage, which is a breach of the covenant, in their own declaration."

RICHARDSON then stated *Vynior*'s case; and said, that if the *plaintiff* had proceeded as in that case, it would have given the *defendant* an opportunity of meeting the case; but at present, *non constabat* but she might have married with the consent of the *plaintiff* himself, and then it would be no breach of covenant.

LAWRENCE, J. "Then why could you not have pleaded, that she married by the consent of the *plaintiff*? How do you mean to say, that you are shut out from pleading it, by the form of this declaration?"

Lord ELLENBOROUGH, C. J. "*Primâ facie*, the marriage is a breach of the covenant. Shew us that it is not an *issuable fact*, on this declaration. If this had been upon a special demurrer, the objection might have prevailed, that this breach of covenant is not properly assigned; but now, if it appears upon the whole of the count that she did an act in breach of the covenant, it will be sufficient to warrant the judgment. Now, the declaration states that after the making of the indenture and after the intermarriage, the said *W.* made his award, so that it must follow, by necessary implication, that the

* 8 *Co.* Rep. 82,

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CHARNELEY versus WINSTANLEY and Wife.

marriage took place before the award. Then, according to the statute, we are to give judgment, not upon the *form*, but according to the *very right* and *substance* of the case, as it appears, on the pleadings: and according to the very right of the case, it does appear on the pleadings that she has broken her covenant with the *plaintiff*, and he must have judgment."

LAWRENCE, J. "The foundation of the motion in arrest of judgment is, that she has intermarried and made void the award, by which she has broken her covenant, and that this fact appears on the declaration; and yet it is now contended that the *plaintiff* cannot have judgment, although the breach of covenant does so appear in the declaration."

RULE DISCHARGED.

REX *versus* STEVENS and AGNEW.—*June* 6.

The word until, *in an indictment, may be inclusive of the day or* terminus ad quem, *if the context require it to be so understood.* Semble *the* King *v.* Inhabitants *of* Gamlingay, 3 T. Rep. 513 *is over-ruled, so far as it decides that the context cannot explain the meaning of the word* from *to be inclusive.*

REX versus STEVENS and Another.

AN information against the *defendants*, on the statute 33 *Geo.* III. c. 62, stated that the *defendant Stevens*, late of, &c. being a British subject, on the 1st day of *January*, 1794, and for a long space of time thence next ensuing [*to wit, until the 29th day of November*, 1795] held and executed the office of supervisor of the province of *Malabar*, &c. and during all that time, resided in the *East Indies, to wit*, at London aforesaid, in the parish and ward aforesaid, (here followed a similar statement as to *Agnew*, who held a subordinate office), and that the said *defen-*

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dant Stevens, so being a British subject as aforesaid, while he held and executed the said office of supervisor of the province of *Malabar* in the *East Indies* aforesaid, under the said united company *as aforesaid,* and whilst he resided in the *East Indies as aforesaid,* [Here the information contained a similar inducement as to the *defendant Agnew*] did, within six years before the filing of this information, *to wit* on the 29th day of *November,* 1795, in the *East Indies* aforesaid, to wit at *London* aforesaid, receive of and from a certain person in the *East Indies* aforesaid, called the *Samoury Rajah,* a certain large sum of money, to wit, 100,000 *rupees,* being of the value of 12,500l. of lawful money of *Great Britain,* as a gift and present, against the form of the statute in that case made and provided; whereby and by force of the statute in that case made and provided, the said *defendants* committed extortion, and by force of the said statute, forfeited the said sum of 12,500l. the money so received as aforesaid, &c. There were several other counts to a similar purport.

The *defendants* being convicted upon this information, DALLAS moved, in *Easter term,* to arrest the judgment, on the ground that the day, on which the offence was laid to be committed, was repugnant to the former allegation of the time during which the *defendants* were stated to be in the *East Indies.* The fact of being resident in the *East Indies* at the time of the receiving of the present, was, he said, necessary to constitute the offence, under the statute. Here they were stated to have been so resident only from the 1st day of *January,* 1794, *until* the 29th day of *November,* 1795, and the offence was laid on the 29th day of *November,* 1795, which therefore might be after they had quitted the *East Indies;* for the word *until,* with respect to time, like *to* with respect to place, is wholly exclusive of the *terminus ad quem;* and therefore the allegation as to their residence in the *East Indies* did not include any part of the 29th day of *November,* 1795. To shew the legal signification of the

word *to*, he cited *Rex* v. *the Inhabitants of Gamlingay*,* and to shew the necessity of alleging a day certain, and not inconsistent, though it is not necessary to prove the day precisely as laid, he cited 2 *Hawkins's Pleas of the Crown*, 334; and 4 Burr. Reports, 2091.

THE ATTORNEY GENERAL, ERSKINE, GARROW, ADAM, WOOD and ABBOTT, now shewed cause, and insisted that the words "to wit, until the 29th day of *November*, 1795," in the inducement, being under a *scilicet* might be rejected as surplusage,† or as repugnant to the subsequent matter, and then there would still remain a sufficient allegation, that the *defendants* were residing in the *East Indies*, without specifying up to what time, and there would be also a day certain laid for the offence, with an averment that they "being such British subjects as aforesaid, while they executed the said office, &c. as aforesaid" committed the offence. And, to an observation from the court that these words under the *scilicet* were not repugnant to matter precedent, but to matter subsequent,‡ they answered that it must be immaterial whether the repugnancy was to subsequent or precedent allegations. And, as to the authority of *Hawkins*, they said that the cases to which he referred were all of indictments laid on days which were either *impossible* or *future*. As in *Moore*, 555. cited in *Hawkins*, 334. the day was impossible, viz. June 31st. So in *Rastall's* Entries, 263, also cited there, the indictment was laid on a future day which had not then come. So in 2 H. 7. 7. it was stated that three persons, at two *Vills*, at two several days, made an assault. And in

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* 3 Term Rep. 513. In that case the court held that an indictment against the parish of *B.* for not repairing a road leading from *A.* to *B.* is *exclusive* of *B.*, and *therefore* bad; and it is not aided by a subsequent allegation, that a *certain part of the* same *highway*, situate in *B. is in decay*, &c.

They are printed above between brackets.

‡ 12 *Mod.* 579. *Johnson* v. *Meers*.—"What comes after *scilicet*, if repugnant, may be rejected."

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another case the *defendant* was said to have stolen a gun on two different days and at two different places. In another case, an appeal of death was held bad, because the mortal stroke was stated on the 10th of *December* and the party was said to die on the 20th of *December*, and so it was alleged on the 14th the murder was committed. These cases were all therefore clear repugnancies or impossibilities. They said it is also clear from the same book c. 23, s. 89, that a repugnancy of a day which is merely an apparent or seeming repugnancy only, and not so in reality, may be set right by the context. They also denied that the word "until," either in *legal language* or in *common parlance*, is necessarily *exclusive* of the day, but, on the contrary, is often *inclusive* where the context requires it to be so. For had it been stated from the 1st day of *January*, 1794, to and including the 29th day of *November*, 1795, it would have been clearly good: and if the 29th could be made part of the time by the use of the word *including*, it might likewise be made so by any other words in context which indicate the same sense. *Pugh v. the Duke of Leeds.** And they said that this, though a case of contract, and not upon an indictment, is yet evidence of the common use of the English language; and also that a hiring *from Michaelmas to Michaelmas*, is exclusive of only one of the days."

Lord ELLENBOROUGH, C. J. "That may be only an informal mode of expression, which is determined by the custom of the place of hiring.

To shew that the word *until* was equivocal in its meaning and must be sometimes understood to be inclusive of the *terminus ad quem*, they gave together with some few others, more or less happy, the following examples:

"Come *to dinner* with me—he lived in great pain *until* the 29th, *when* he died—you shall not come to *London until* next year under the penalty of 1,000*l*."

* Cowper, 714.

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[LAWRENCE, J. "The penalty would not be forfeited in that case if the party came in 1805."]

"She lived chaste as ice *until* the marriage day." "Statutes made at a parliament holden on, &c. and *continued* by several adjournments to the 29th day of *October* 1803." "The argument in this case shall *stand over till* to-morrow."—"*Ab ovo* USQUE AD *mala*."—"I shall go to Bath, and stay *until* the 29th day of *October*." All these expressions, they considered as inclusive. They also instanced the form of proceedings in cases of murder beginning with the commitment to prison, and ending with execution. Thus in *Burn's Justice*, there is a commitment "until the next general gaol delivery," which must include the sessions or assizes.

[LAWRENCE, J. "The gaol is not *delivered* until the last thing at the end of the sessions."]

In the case of the *King* v. *Carney*, at the *Old Bailey September* sessions, the indictment stated as follows:—"Of which said mortal wounds and bruises she the said *Ann Carney*, from the said 2d day of *August until* the 17th day of *August*, did languish and languishing, did live,* and *on that* day did die," &c. and when the *defendant* was sentenced he was ordered "to be taken *to* the place from whence he came, and from thence *to* the place of execution, there to be hung *until* he was dead." This, they said, must necessarily be inclusive, or else the criminal must stop short of the gallows and be cut down before he is dead.

* The indictment in the cases of Governor *Wall* and Earl *Ferrers*, and also in 4 Rep. 41, were stated to be similar, and though the averment might not be necessary, it was said that it still proved the sense of the word *until*.

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Lord ELLENBOROUGH, C. J. "Was it ever held necessary to say that the murdered man lived *until* the day when he died? Would it not be sufficient to state that he received the mortal stroke on one day, and died on another."

LAWRENCE, J. "His living '*until* the day,' does not imply that he lived and languished beyond the first moment of the day on which he died; but yet, because it is stated that he died on a certain day, you infer that he lived on that day. Suppose the indictment had stated 'he *languished until* the 27th, and *died* on the 29th?"

DALLAS, GIBBS, and TORKINGTON, *è contrà*, argued, in support of the following positions;—first, that *until*, as applied to time, and *to*, as applied to place, are according to their usual meaning, exclusive of the *terminus ad quem*; secondly, that the arguments drawn from cases of contract, as to the meaning given in such cases, do not apply to indictments;* thirdly, that there is nothing in the subsequent part of the indictment to alter the meaning of the word, so as to make it inclusive; even if the doctrine of construction, as applied to cases of contracts, applies to indictments; and fourthly, that supposing it is *exclusive* or, being only equivocal, the subsequent words do not determine the meaning to be inclusive, no day is sufficiently alleged in the indictment of the *defendant's* holding any office in the *East Indies* at the time of receiving the bribe; which is necessary to sustain the charge, though it is not necessary that the day laid in the indictment should be proved precisely. And first, they contended that no arguments had been used to shew that the word *until* is *ex vi termini* inclusive, but merely that in some forms of expression, in common parlance, it is so. Most of these instances, they said, were *peculiarly*

* *Rex* v. *Inhabitants of Gamlingay*, 3 Term Rep.

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unhappy; but no case could be cited in which the word *until*, in an indictment, was ever held to be "inclusive." In pleading, it is often held to be exclusive, as in *Nichols* v. *Ramsell*, 2 Mod. 280. A trespass was laid on the 24th of *April*. The *defendant* pleaded that on the said 24th day of *April* he paid the *plaintiff* a sum of money which he accepted in satisfaction of all trespasses *usque ad* the said 24th day of *April*; with a *traverse* of any trespasses committed after the said 24th day of *April*; and upon special demurrer it was held that the plea of satisfaction did not go to the trespasses on the 24th day of *April*, *usque ad* being exclusive. So in *Owen*, 50. In an action of debt on bond, the *defendant* pleaded a release "*usque ad diem dati ejusdem scripti*," viz. 9th of *July*; and it was held exclusive of the 9th of *July*. Secondly, nothing is to be taken by intendment, as to indictments, whereas the rule in contracts is directly the reverse, namely, that they shall be construed so as to support them and make them valid if possible, by any reasonable intendment. Thirdly, if the word *until* is equivocal or ambiguous, there is nothing in the subject matter to give it an inclusive meaning, so that even on a contract to serve the company from the 31st day of *January*, 1794, to the 29th of *November*, 1796, there would be nothing to shew that they must serve on the 29th of *November*, 1796. Fourthly, it is said that the words *under the scilicet* may be rejected. "Whether, if the information had been drawn without the averment under the first *scilicet*, it would be good, is not the question; but whether as it stands that averment can be now rejected. This depends on the nature and effect of a *scilicet* which is very learnedly though very *quaintly* explained in *Studly* v. *Butler*:* It cannot begin or end a sentence. It is *clausa ancillaris*. It is an interpreter. It must not be contrary to the premises. It must neither increase nor diminish, but explain the precedent matter.

* *Hob.* 172.

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And in *Saunders*, 170, it is laid down, that a *scilicet*, repugnant to the precedent matter, shall be void, but where it is not so, it shall be taken for a direct allegation.

Lord ELLENBOROUGH, C. J. "Is a *scilicet* any thing else than an explanation of the subject matter? That may be effected either by restraining or enlarging what goes before. There is no difference between the construing of a subject of this kind and a page in the *Spectator*."

GIBBS. "In every case quoted, the reason for rejecting any part of a sentence is stated to be, because it is repugnant to the precedent matter. A *scilicet* is merely an explanation, and, if it is inconsistent, it may be rejected, because it is then mere nonsense, and cannot operate as an explanation; if it is not inconsistent, then it is the party's own explanation of his own words, and he must stand or fall by it. It is to explain the premises, and not what follows. This is the sum and plain sense of the doctrine of rejecting what is under a *scilicet*. Here the precedent matter is not repugnant: it is only that on the 1st day of *January*, 1794, and for a long time thence next ensuing, the *defendant* held the office; which is perfectly consistent with a *videlicet*, that he held it also up to the 29th day of *November* 1795."

Cur. adv. vult.

In this term the *defendants* were brought up to receive the sentence of the court, when the opinion of the court was delivered, previous to the passing of sentence, to the following effect, by

Lord ELLENBOROUGH, C. J. after stating the case: "The defect pointed out upon the information was, that there is a repugnancy in the allegation of the day of committing the offence and the time during which the *defendants* were alleged to be officers of the *East India company*; for the particular day alleged, and which it is ne-

cessary to state, does not fall within the time, before stated, when they were officers of the company. This repugnancy, it is said, may be cured by rejecting as *surplusage* the words under the first *scilicet, until the 29th of November, 1794.* But there is no authority to reject any thing as surplusage, which is not inconsistent, and here it is altogether sensible and not repugnant. In *Wyatt* v. *Aland*, Salk. 324, it is held, that the precedent matter, which is sensible, shall not be rejected, but what follows, shall if it is repugnant. Here the *scilicet* is precedent to the particular day laid for the offence, and is also sensible in the place in which it occurs. Construing the word *until* inclusively, the whole objection will be avoided; but, it is argued, that in indictments the word *until* must have an inclusive sense, and for this the case of the *King* v. *the Inhabitants of Gamlingay** is cited. On the other side, it is contended that the word *until*, in its ordinary sense, is equivocal, and may be either *inclusive* or *exclusive*. For this, several instances were given, to which I will add only that in Sir *Matthew Hale*'s history of the common law, he uses this expression, 'Until the time of *Edward* I. inclusive.' So in *Ayliffe*'s *Parergon*, 158, there is a passage of a similar construction. [His lordship read the passage.] Hence it appears that, by the most accurate writers, the words *to* and *until* may be used in either sense, and, where ambiguity is to be avoided, they are capable of being explained by the words *exclusive* or *inclusive*. If so, they may be also explained by other words, which equally shew the meaning of the whole context. If the word *until* occurred in a contract, and the nature of the contract required it to be construed inclusively, the court would construe it so as to effectuate the contract. This the cases cited shew most clearly. And in 1 *Salk.* 324, *Wyatt* v. *Aland*, Lord *Holt* said, that where words are capable of different expositions, that shall be taken which supports the declaration or agreement, and not that

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* 3 Term Rep. 513.

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which defeats it. That was upon a declaration in a case of libel which is equal in strictness to the rule of construction applicable to indictments. The word *until* is therefore clearly capable of two meanings, and if it may be explained by the words *inclusive* or *exclusive* it may be explained also by any other words which follow. It must therefore be explained by the next clause, which is as follows, 'the said *defendant* being a British subject aforesaid, while he held and executed the said office of supervisor of the province of *Malabar* in the *East Indies* aforesaid, under the said *united company as aforesaid*.' This shews the meaning of the word *until*, as it was understood by the framer of the indictment; for, by means of the word *aforesaid*, the word *until* is drawn down, and inserted by reference into an inclusive sentence, to which it must necessarily be construed inclusively. Instead of the word *aforesaid*, in this sentence, insert the words to which it refers, and it will run thus: 'While he held and executed the said office of supervisor of the province of *Malabar*, in the *East Indies* aforesaid, under the said *united company* on the 1st day of *January*, 1795, and for a long space of time thence next ensuing until the 29th day of *November*, 1795, &c. did within six years before the filing of the information, to wit, on the 29th day of *November*, &c. commit the offence.' In either of these ways [his lordship read it in two ways] the sense will be found to be clearly inclusive. For unless it was so, the *defendants* could not receive the money during the continuance in office. This then gives the whole a sufficient degree of certainty, if we are authorized in construing the word *until*, in an indictment, as we should construe it in every other case, and there is no rule to the contrary. Every indictment should indeed be *certain*; but except in particular cases, there is no rule that other words should be used than those which are in common use in the English language, and a repugnancy can only exist where one part cannot be explained by another. The day laid is therefore not repugnant if the word *until* is explained to be inclusive; and on the whole, we are

of opinion, that the word *until* is capable of receiving such a construction, and that not only the particular form of the indictment by reference from the word *aforesaid* in the next clause, but the whole context requires that we should so construe it."

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Rex versus Stevens.

THE RULE DISCHARGED.

MULLOY *versus* BACKER.—*June* 12.

A. a captain of a Dutch *ship, took* B. *on board, at the Island of* Demerara, *together with his luggage and family, to carry him to* Flushing, *in* Holland; *the ship was captured as prize to a British ship of war, and libelled with the cargo in the British court of* Admiralty; B. *the passenger was released and his luggage,* de facto, *restored to him, but not by adjudication of the court; such part of the cargo as was British property was restored to the owners, and the rest condemned as prize. The vessel was claimed by a British subject. Pending the suit in the* Admiralty, A. *brought* assumpsit *against* B. *for the passage-money, with a* quantum meruit pro rata itineris: *Held, that the* plaintiff *could not recover; at least, not until the court of* Admiralty *had decided on the question of prize. The* plaintiff *was therefore nonsuited.* Semble, passage money *is the same as* freight.

Mulloy versus Backer.

ACTION of *assumpsit*, tried before Lord ELLENBOROUGH, C. J. at the sittings after *Hilary term*, at *Guildhall*; verdict for the *plaintiff* for 250*l.* subject to the opinion of the court on the following case: "In *February*, 1803, and before the commencement of the present war with *Holland*, the *plaintiff*, who was the master of a merchant-ship called the *Doonhaag*, then lying at the *Dutch* settlement of *Demarara*, agreed with the *defendant* there to convey his family, servants, and luggage, permitting him to have the exclusive use of the cabin from thence to *Flushing*, for the sum of 2400 *Guilders* equal to ——Sterling. In the month of *April* following, the said ship, under the command of the *plaintiff* with the *de-*

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Mellor versus Baxter.

fendant, his family, servants, and luggage on board, sailed from *Demarara*, destined for *Flushing*, and on her arrival at the entrance of the *British* channel, on the 4th day of *July*, was captured by his Majesty's armed brig the *Rambler*, and carried into *Plymouth* as a *Dutch* ship, war having been previously declared by his Majesty against the *Batavian* republic.—The *defendant*, his family and servants were set at liberty at *Plymouth*, and their luggage restored to them; but several pipes of wine, which the *defendant* had on board, were and still are detained by the captors. The vessel and her cargo have been libelled in the *court of Admiralty* for condemnation; but no decision as to the vessel, which had been claimed in that court by a *British* subject as his property hath yet taken place; so much, however, of the cargo as was the property of *British* subjects has been restored, and the remainder of the cargo has been condemned as lawful prize. The vessel, at the time when she was captured as aforesaid, had been sixty-five days on her voyage from *Demarara* towards *Flushing*, and by the usual course of navigation she would have completed her voyage to *Flushing* in four days more.—*Question*, whether the *plaintiff* is intitled to recover any, and what sum?

Richardson, for the *plaintiff*, cited *Lake* v. *Lyde*;* *Cooke* v. *Jennings*;† and *Bright* v. *Cooper*;‡ and contended that the *plaintiff* was entitled to recover on the *quantum meruit pro rata itineris*, for that part of the voyage which had been performed. "The *defendant*," he said, "accepted his luggage. This is an *assumpsit* on his part to pay *quantum meruit*; in other words, to pay *pro rata itineris*. The original contract was to carry the *defendant*, on a voyage of about ninety days, sixty-five of which have been performed, and the rest of the voyage has been frustrated without the default of the *plaintiff*.

* 2 *Burr.* 882. 1 *Blac.* Rep. 190. † 7 Term Rep. 381.
‡ *Brownlow*, 21.

So with respect to the wines, they also were taken by the captors without any fault on the part of the *plaintiff*. In *Cooke* v. *Jennings*, LAWRENCE, J. says, perhaps the subsequent receipt of the goods might have been evidence of a new contract. It is not necessary in this case to go at length into the principles of universal law as laid down by Lord *Mansfield* in *Luke* v. *Lyde*; but if it is to be said that the *plaintiff* cannot recover because the ship itself has not yet been restored, yet it is sufficient to answer that nothing unlawful has been done on the part of the *plaintiff*. The contract was lawful at the time of its inception, and the *defendant*'s luggage has been restored."

GILES, *contrà*, made two questions;—first, the liability of the *defendant* to pay; and, secondly, the ability of the *plaintiff* to recover. The contract of the *plaintiff* is an entire contract to carry the *defendant* from *Flushing* to *Demarara*; and then, according to *Cooke* v. *Jennings*, he cannot recover."

LAWRENCE, J. "Perhaps it may be otherwise according to the *Dutch* law, and then *Cooke* v. *Jennings* will be no authority for you; for this is a contract to be performed in *Holland* made in a *Dutch* colony."

GILES. "Then it is for the *plaintiff* to make out that the law of *Holland* is so. In *Cutter* v. *Powel*, it was held a mariner could not, upon a contract for the voyage, recover wages for a part of the time. Where a contract has not been performed, the party cannot claim on his express covenant; but is driven to his implied covenant. But this is said to be like *freight*, which is recoverable *pro rata itineris*. If so, this also, like *freight*, must be recoverable only on an implied contract arising out of some new benefit to be done by one party to the other."

Lord ELLENBOROUGH, C. J. "*Luke* v. *Lyde* seems to be founded on a *quantum meruit* for something done

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previously, namely, the carrying of the goods, although the whole voyage was not ultimately performed."

GILES. "I need not question the whole of the case of *Luke* v. *Lyde*, but I think I may deny the existence of the fact, in that case, out of which, upon the principles there stated, the freight *pro rata itineris* accrued; for the goods were not forwarded on their voyage at all. They were taken only to *Biddeford*, which is as far distant from *Lisbon* as *Newfoundland*, so that the party had derived no benefit at all."

Lord ELLENBOROUGH, C.J. "The carrier had done all that he could: and it is not necessary that it should actually be a benefit to the one party if it was a loss to the other. It is, at least, not necessary that there should be a benefit and advantage moving from you, if you have bestowed your labour in order to procure it."

GILES. "But in this case, where there is no benefit, it must stand upon the express contract. It is not necessary to argue that point now: for I go upon the principles stated in the case of *Luke* v. *Lyde*. There, when the goods were at *Biddeford*, the *carrier* had a right to carry them forward to *Lisbon* in another ship, and although that would not be much for his own benefit, yet, in consideration of his giving up the goods and that right to proceed, the *defendant* there contracted to pay, by implied assumpsit, *pro rata itineris*."

Lord ELLENBOROUGH, C. J. "No, the party took the goods not of the captain of the ship, but of the recaptors. The owners of the ship had then no lien on the goods."

GILES. "When goods are recaptured, the new owner of the ship is obliged to deliver them up, upon payment of the salvage by the owner; so that the captor could not give them up to the freighter without the license of

the owner of the ship, and the argument of Lord *Mansfield*, in his judgment, proceeds on the supposition that the owner of the ship might have carried the goods on; and whether the rate is to be computed on the labour, or on the benefit conferred, is immaterial. The case here is, that the ship is brought in as prize with the *defendant* and his *portmanteau* on board; the ship is libelled, the person is permitted to go at large, and his *portmanteau* is given up: but that is done by the lenity of the captors and of the government, and is no act of the *plaintiff* or the owner of the ship."

Lord ELLENBOROUGH, C. J. "No, that is not actually so stated in the case. It does not say by whom the luggage was delivered to the *defendant*. It was probably by the captors, but it is not so stated."

GILES. "It is, however, stated, that the ship is libelled as prize, and the *plaintiff* could not have detained the *defendant's* person till he had paid the passage-money, as he might goods for freight. In *Luke* v. *Lyde*, and the other cases, the merchant is only held liable in consideration of the *plaintiff* waving some right which he has on the goods, upon the giving up of which a new implied contract arises: but that principle does not apply here. Here the party has given up nothing, and we have not received any benefit from him, for we are brought in prisoner, and what we have recovered of our property is received from another person, and I cannot see what right *A.* can have to claim of *B.* a *quantum meruit* for that which was done by *C.* Secondly, what right has the *plaintiff* to sue? He is a captain of a ship now libelled in the court of admiralty. If the ship is condemned he cannot claim either the freight or the goods: both must go to the captors. If there is any claim to the goods, it must be in the captors. There is no pretence for the *plaintiff's* claiming such a right. If he recovers in this action, the ship may notwithstanding be afterwards condemned, and the judge

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of the court of admiralty may order the freight to be paid to the captors, he, the judge having the complete control over that subject. Then the *plaintiff* is at least premature in bringing his action until the right is determined. In general, indeed, the practice is that they do not order the freight to be paid to the captors."

Lord ELLENBOROUGH, C. J. "Have you any case in which the court of admiralty has compelled the captain of a foreign vessel to pay over the freight to be received *pro ratâ itineris*."

LAWRENCE, J. "The foreign writers on freight consider money to be paid for passage just the same as freight. *Roccus de Naulo* inquires whether *freight* is due for a passenger in particular cases, and puts a question, whether, if a woman be brought to bed, *freight* is to be paid for the *infant*?"

Lord ELLENBOROUGH, C. J. "I agree with you, however, that I do not see any difference between *freight* and *passage-money*. It is the same thing, whether it be for the carrying of live things or dead. The circumstance of the *lien* may probably make the only difference."

GILES then shortly recapitulated his argument, and concluded that the *present plaintiff* was not entitled to recover any thing for freight at all, and that if entitled to any thing, it was only for the luggage.

RICHARDSON, *in reply*. "The grounds upon which it is admitted that a new contract may arise, have been too much narrowed by the *defendant*'s counsel. Here has been labour and loss on the part of the *plaintiff*, which is sufficient to entitle him to his *quantum meruit* although it turns out unproductive of benefit to the *defendant*. It has been insisted that the liberation of the *defendant*'s person, family, and luggage was not the act of the *plaintiff*: but the hand from which it comes is in no

wise material. This liberation must take place in order to entitle us to recover; but the service done, and for which the *quantum meruit* is claimed, is not the liberation of the *defendant*, but the carrying him and his goods."

Lord ELLENBOROUGH, C. J. "This case is materially distinguishable from the case of *Luke* v. *Lyde*, for in that case there was an actual acceptance of the goods, and an acquiescence in the new contract."

RICHARDSON. "As far as the circumstances here can be assimilated, I submit that they are still similar. Here has been an acceptance on the part of the *defendant*. The right of the master to insist on getting another ship to carry the party forward on his voyage still exists. The consideration is not a mere lien, but a right of doing something which the owner gives up."

LE BLANC, J. "Does not the case state that you were disabled from doing that which you say you gave up? It states that you were a prisoner of war."

RICHARDSON. "To make that a defence, there should have been a request on the part of the *defendant*, and a refusal on ours. In the case of *Luke* v. *Lyde*, there was the same disability, the ship was not in the hands of the party. Here, at least, the labour was performed."

Lord ELLENBOROUGH, C. J. "So it would have been if the ship had been lost at sea with both the captain and the passenger. But, could the executors of the captain, or the owners of the ship, have recovered against the executors of the passenger?"

RICHARDSON. "Here, however, there is no loss; and in case there had been a loss, and part of the goods had come on shore, the passenger would have been liable on a *quantum meruit*."

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MULLOY *versus* BACKER.

indeed admitted that the court of *admiralty* does very often give up the goods of passengers; but it must be admitted also, that the admiralty has a power to adjudge them to the captors, and that they do not go to the original owners of the ship. In case the right to the claimant's goods is to be admitted, that court will order them to be restored to him; but he cannot have them legally without such order."

LE BLANC, J. "It is not necessary to give an opinion upon the case of *Luke* v. *Lyde*; but we may consider this demand for passage-money the same as if it were only freight for the goods. If it was a case of goods, and similar to *Luke* v. *Lyde*, even then the *plaintiff* would be entitled to recover, not because any thing is due under the original contract, but because our courts having acknowledged the contract on the marine law, he is then entitled to a *quantum meruit* for something which may be sufficient to raise a new *assumpsit* upon, and may so recover for some benefit antecedently done to the defendant or some labour performed with a view to his benefit. But here the ship is captured, the *plaintiff* is a prisoner, and every thing of value, every benefit to be derived from his ship, every thing earned by her belongs to another person. There is, therefore, nothing upon which to found a new *assumpsit*. And although there has not yet been a condemnation of the ship, I am at a loss to consider how the *plaintiff* can stand in a different situation than he would have been in if there had been an actual condemnation."

JUDGMENT OF NONSUIT.*

* The case was drawn up that there should be judgment for the *defendant*; but that advantage was waved by the *defendant's* counsel.

NOEL and others *versus* ——— *June* 19. 1804.

All affidavits in a cause, excepting affidavits of the cause of action before process sued out, must be entitled with the names of all the parties, and the plaintiffs *and* defendants, *and with their respective christian names. The rule of court need not be so entitled.*

NOEL and Others *versus*

THIS was a rule to refer it to the master to compute interest, &c. upon a bill of exchange. Affidavits were filed for the purpose of opposing it upon some special circumstances: but they were entitled with the christian name of only one of the *plaintiffs*, omitting the christian names of the others. They were objected to on that ground.

Lord ELLENBOROUGH, C. J. "It must be understood that in all cases of affidavits *in a cause*, they must be entitled by stating the names of all the parties, both *plaintiffs* and *defendants*, with their respective christian names also: although it is not necessary to state them so in the rule. The reason for requiring it in affidavits is in order that, if requisite, the parties may be indicted for perjury."

THE MASTER referred the court to a case in the Term Reports, probably *Fores* v. *Diemar*.* The court refused to permit the affidavits to be read, and the

RULE WAS MADE ABSOLUTE.

WIGLEY *versus* JONES.—*June* 19.

In an action against the marshal for an escape on mesne process, *the* plaintiff *declared on a commitment on* habeas corpus *by a judge at*

* 7 Term Rep. 661.

1804.

chambers, with a prout patet per recordum, *and on the trial produced no record in evidence, but the writ from the office of the clerk of the papers of the K. B. prisn.: Held, that this is only quasi a record, but good evidence, there being no mode of recording such a commitment in practice, and the* prout patet *is surplusage.* Aliter *in the case of a commitment in execution.*

Wigglesworth *versus* Jones.

THIS was an action against the *defendant*, the marshal of the *King's Bench* prison, for 34l. 9s. damages sustained, by the escape of one *Mary Bergeret de Troncille* out of the custody of the *defendant*.

The declaration stated that the said *M. B. de T.* was indebted to the *plaintiff* in 34l. 9s. and that in *Trinity* term last, he sued out a bill of *Middlesex*, indorsed to hold to bail for the said sum of 34l. 9s. and that under such precept the said *M. B. de T.* came into the custody of the sheriff of *Middlesex*. That the said *M. B. de T.* being in such custody, for the cause aforesaid, on the 24th day of *September*, in the year aforesaid (1801) was brought before Sir *Simon Le Blanc*, knight then one of the justices, &c. at his chambers in *Serjeants' Inn, Chancery lane*, by virtue of a certain writ of *habeas corpus*, issuing out of the court of our said lord the king, &c. and directed, &c. "and the said *M. B. de T.* was thereupon committed by the said Sir *S. Le Blanc* into the custody of the *defendant*, at the suit of the *plaintiff*, in the plea aforesaid, and for the cause aforesaid, there to remain until, &c. *as by the record thereof* now remaining in the said court of our said lord the king, before the king himself, manifestly appears," by which said commitment, &c. The declaration then stated the escape. The *plaintiff*, in support of his case, at the trial before Lord ELLENBOROUGH, C. J. at *Westminster*, proved the debt due from the prisoner, the affidavit of debt, and the arrest; and then produced the *habeas corpus* upon which the prisoner was removed from the custody of the sheriff and committed by *Le Blanc J.* to the custody of the *defendant*. This writ was produced by the clerk of the papers of the *King's Bench* prison, which he stated was filed with him as clerk of the papers. Upon which

was objected by the *defendant*'s counsel that the production of the writ, in the hands of the clerk of the papers, did not support the averment in the declaration, "as by the record now remaining in the said court of, &c. manifestly appears;" and they cited *Turner* v. *Eyles*.* The *plaintiff* having gone through his case, the *defendant* proved that at the time the prisoner escaped, she was supersedable in the *plaintiff*'s action, upon which a verdict of 1s. damages was given for the *plaintiff*, with liberty for the *defendant* to move for a nonsuit to be entered on the above point; and a rule nisi was accordingly obtained;—and in *Easter* term,

GIBBS and MARRYATT shewed cause and said; "The writ produced was the record itself, and the only document of record that could be produced."

[Lord ELLENBOROUGH, C. J. "Is the word *record* applicable to any paper in the custody of an individual."]

"This is not in the custody of a private person, the marshal is the proper officer for the purpose of keeping this record; there is no other office, roll, or place in which it can be entered and kept."

LE BLANC, J. "Is there any difference between a commitment in term and in the vacation. If the prisoner is committed by the court, in open court, then it is never upon the file of the clerk of the papers of the *King's Bench* prison. But if it is a commitment by a judge at chambers it goes with the prisoner to the *King's Bench* prison. In the case of an execution, it is entered upon the judgment-roll."

* 3 *Bos.* and *Pul. Trin.* 43 *Geo.* III. and 2 *Law Journal*, 481.

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Wigley versus Jones.

Lawrence, J. "Why is it not upon *mesne* process entered upon the roll in the same manner as upon a *scire facias*? If there is no roll, why not make a roll for the purpose?"

Gibbs. "In point of practice, it is never done; though it certainly might be done if it became necessary. In cases of execution, entries are made upon the roll, but never in cases of *mesne process*. The office of the clerk of the papers may be considered as the depository of the records of the court for this purpose."

Lord Ellenborough, C. J. "Then there is this inconvenience that the records of the court are to be scattered up and down in the custody of persons over whom the court has no control. The clerk of the papers of the *King's Bench* prison is an officer of the marshal, and not of the court. His office is not even in this county. In *Turner* v. *Eyles*, the court took it for granted that an act of a judge at chambers would not be available as an act of the court until it was entered of record. Until I read that case, I thought the evidence was sufficient here."

Marryatt then instanced the various offices in which similar records of the court are kept, such as the *Filacer's*, where the writs are kept and the clerk's of the declarations also, where declarations are kept; and said, that though it never was known that there was any other place for the entering of records of commitments, yet all the precedents agree with the declaration in this case, and if this was not a record, then there hardly ever was an action brought for an escape which in strictness ought to have been maintained. That when the *Filacer*, upon *certiorari*, returns that there is a writ, he states it as of record, and yet, when it is proved at *nisi prius*, either the writ itself is produced, or an office copy of it, and not a formal roll. That in the case of bail the *recognizance* is acknowledged in court, and there is a proper mode of mak-

ing it a record. That if this was not a record, and there is no record in practice, the description in the declaration was not appropriate, and might be rejected as surplusage; and it would be sufficient if it was stated, as would then be the case, that the prisoner was in fact committed.

[LAWRENCE, J. "If my brother LE BLANC had remanded the prisoner into the custody of the sheriff with the writ, would that also have been a record of the court? That is very often done when it appears to be a sham action."]

"In that case it would not be necessary to set out the *habeas corpus* in the declaration: it would be sufficient to state only that the prisoner was arrested, and in the *defendant*'s custody."

ERSKINE and GARROW, *contrà*. "The argument here is the reverse of that in the *Common Pleas*. There it was said it might be necessary on *mesne process*, but not on execution. Here it is said to be necessary on execution, and not on *mesne process*. A record is not an act of the court itself, or an original process: it is the memorial of an act done, or of a process issued; but if this writ is a record, the existence of a memorial of process issued is to be shewn by producing the process itself. When the statute of limitations is pleaded, the writ is not permitted to be produced in evidence until the issuing of it is stated of record, and continuances are entered upon the roll for six years back; and in like manner, when a *plaintiff* is nonsuited generally he neglects to enter it of record, but yet if the *defendant* has occasion to proceed against him upon it, he is obliged to enter it of record for him." They, therefore, insisted that there would be no peculiar hardship in requiring a record to be made and produced in this case, and that the production of the *habeas corpus* and indorsement was not evidence of the record.

Curia. adv. vult.

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WIGLEY versus JONES.

And now, on the last day of *Trinity* term, the opinion of the court was delivered to the following effect, by

Lord ELLENBOROUGH, C. J. after stating the case: "It appeared upon the trial that commitments of this sort are never kept in any other manner than this commitment was, and that they are never, in fact, deposited in the *Treasury* chamber, as the records of the court are. It was therefore insisted that either the averment was surplusage, or this was a sufficient record of the court for the purpose. Since the argument on the motion, we have caused inquiry to be made as to the existence of any other custody of, and any other mode of recording the commitment, and do not find that any other record has been kept or filed than in the place and in the manner in which this was; and that the commitment remains in the hands of the clerk of the papers of the marshal as any other warrant. Nor is it properly capable of being entered of record: although in the case of a *habeas corpus*, where the party is taken in execution, the commitment may be entered on the roll. As therefore it neither is a record, nor capable of being made so, the *prout patet* is either to be considered as surplusage, as in *Walker* v. *Whitter*,* or this commitment is within the meaning of it, so that it is to be understood as applicable to the subject matter, and to that which is only *quasi* a record."

JUDGMENT FOR THE PLAINTIFF.

BARING and others *versus* CHRISTIE. *June* 19.

A passport expressed to be granted to George Dominick, *master or commander of the ship, called the* Mount Vernon, *of the town of* Philadelphia, *of the burthen of* 424 *tons, or thereabouts, being at present in the port of* Philadelphia, *does not contain a description of the habitation of the master under the* 25*th article of the treaty between* France *and*

* 1 *Doug.* 1.

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America, which it is necessary to have on board, to entitle the ship to all the privileges of an American neutral ship. For, the words "of the town of Philadelphia," apply to the ship, and not to the master. Q. What is the true form of the passport annexed to the treaty?

WRIT of Error from the *common pleas*.—DECLARATION on a policy of insurance, dated on the 18th of *June*, 1796, (effected by the *plaintiffs*, as agents for Messrs. *Wellings* and *Francis*) from *Philadelphia* to *London*, with liberty to touch at *one port* in the *channel*, on the ship *Mount Vernon*, an *American* ship, Capt. *Dominick*, master, and on the goods valued as therein, &c. viz. coffee, in the usual form, at a premium of 3 gs. *per cent*; loss by capture, as prize, by certain persons unknown. There were other counts, upon other similar insurances, made on other goods. *Plea*, the general issue. Whereupon, a special verdict was found, stating that the insurance was made as in the first and third counts mentioned, and that the goods were put on board, and that the parties were interested, &c. That on the 2d of *June*, 1796, the ship departed from *Philadelphia*, and sailed for *Cowes*, in the *Isle of Wight*, and for such other port as the *plaintiffs* should direct; that she cleared out for *Hamburgh*, and had on board a certificate of the clearance and manifest of the cargo, as follows: "*Port of Philadelphia*: these are to certify to all whom it doth concern, that *George Dominick*, master or commander of the ship called the *Mount Vernon*, burthen 424$\frac{77}{95}$ tons, mounted with —— guns, navigated with —— men, *United States* built, and bound for *Hamburgh*, hath here loaden and taken on board cargo per manifest annexed, and hath here entered and cleared his said vessel according to law, and these are further to certify that it appears by the original register now produced to us that the above mentioned ship was registered at *Philadelphia* on the 2d day of *May*, 1796. *Given*, &c;" and that the same was entitled "Manifest of the cargo of the ship *Mount Vernon*, *George Dominick*, master, bound for *Cowes* and *Hamburgh*, in Europe." That she had on board at the time the following *sea-letter* or *passport*, to wit:—Form of triplicate-pass,

Declaration.

Special Verdict

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Sea Letter.

Translated from the *French*, *George Washington*, president of the *United States* of *America*.—"To all who shall see these presents be it known, that leave and permission has been granted to *George Dominick*, master or commander of the ship called the *Mount Vernon*, of the town of *Philadelphia*, of the burthen of 424$\frac{71}{95}$ tons, or thereabouts, being at present in the port of *Philadelphia*, and bound for *Hamburgh*, loaded with sundries, per manifest; that after this ship has been visited, and before his departure, he shall make oath before the officers authorized for this purpose, that the said ship belongs to one or more citizens of the *United States* of *America*, the act whereof shall be placed at the foot of these presents, and in like manner that he will keep and cause to be kept by his crew the maritime ordinances and regulations, and enter into a list signed and confirmed by witnesses, containing the names and surnames, the places of birth and residence of the persons composing the crew of his ship, and of all them who shall embark therein, whom he shall not receive on board without the knowledge and permission of the officers thereto authorized; and every port or harbour where he shall enter with his ship, he shall shew the present permission to the officers authorized thereto, and shall make a faithful report to them of what has passed during the voyage; and he shall carry the colours, arms, and ensigns of the *United States* during his said voyage in testimony, &c. on the 30th of *May*, 1796." The *triplicate-pass* also contained a pass in *English* and in *Dutch*, in two other separate columns, translated and set forth in the special verdict. The verdict stated also that before the ship belonged to *Wm. Mayne Duncanson*, as after mentioned, she had belonged to one *Thomas Murgatroyd*, a citizen of *America*, and contained a certificate of register dated the 2d of *May*, 1796, according to an act of Congress,* under which the ship sailed, stating *Thomas Murgatroyd* to be the sole owner; that the *plain-*

* Vide post.

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tiffs, before the effecting of the said insurance, had determined that the said ship and cargo should proceed to the port of *London*, and there finish her cargo; that before the effecting of the policy, the importation of the said cargo was made legal by order of council, under an act of parliament passed on the 14th of *May*, 36 *Geo.* III. That the *plaintiffs* obtained an order of council for the importation of the said cargo, dated the 19th of *July* 1798, and the *plaintiffs* directed the said ship to proceed from *Cowes* to the port of *London*, and there finish her voyage: that if the ship could not have discharged her loading here, she would have proceeded to *Hamburgh*; that the ship was *American* built, but was the sole property of one *Wm. Mayne Duncanson*, who was born a *British* subject, but was domiciliated in *America* from *August*, 1794, to *October*, 1796; that he was not entitled to be naturalized at the date of the policy; that on the 11th of *October*, 1796, he was naturalized. That on the 9th of *June*, 1796, the ship was captured by the *French*, and was condemned as prize at *St. Domingo*, while she was detained at the port of *St. John*, in the *Spanish* island of *Porto Rico*; that the sentence of condemnation was as follows:—13th *Fructidor* (the 30th of *August*, 4th year) condemnation of the *English* ship *Mount Vernon*—Extract of the books of the provisional tribunal respecting prizes established in *St. Domingo*: We, *Francis Pons*, judge of the provisional tribunal respecting prizes, established in *St. Domingo*, having looked over our sentence of 7th *Thermidor* last, where all the papers exhibited by *Citizen Nadal*, captain of the privateer, *Flyer*, against the ship *Mount Vernon*, are duly noticed, through which we had submitted the decision of the prize to the civil commission of *Guraico*, which applies again to our tribunal for pronouncing sentence on this subject, having noticed also instructions, which were officially given us by the citizen agent of the *French republic*, in this city issued, by the civil commission aforesaid, in whose archives the same have been duly recorded, from which it appears

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1st, that the papers were thrown into the sea by the captain in sight of the privateer, which captured him; 2dly, that the captain and supercargo, having precipitately abandoned their ship in spite of the good treatment received by them from the *French* captain, and the *hints* he gave them about remaining there, in order to plead their own cause, and thereby avoid her confiscation; thirdly, the behaviour of the captured crew; fourthly, the captain being a *Portugueze* without a certificate of his naturalization; fifthly, that the *United States*, in the last treaty which they concluded with *England*, have suffered to be added to the articles, which have been looked upon till at present as contraband of war, *staves*, *tar*, *tackles*, *sail-cloth*, *iron-hoops*, and finally, all which can be made use of for *the* vessels, are sufficient motives to condemn the said ship; after a serious examination we have adjudged, and do judge, that the ship, *Mount Vernon*, capt. *George Dominick*, a *Portugueze*, with her cargo, has been duly and justly captured by the *French* privateer, commanded by citizen *Nadal*, to whom we adjudge the same as property belonging to him, &c.—*St. Domingo*, *Fructidor* 13, (13th *August*), 4th year of the *Republic one*, &c. Signed in the register, PONS, judge, and DESPUGEAN, notary public.—Signed, PONS, judge, and DESPUGEAN, notary. The special verdict also found the 12th article of the treaty between *America* and *France* of the 6th of *February*, 1778, viz. "The merchant ships of either of the parties which shall be making into a port belonging to the enemy of the other ally, and concerning whose voyage and the species of goods on board her, there shall be just grounds of suspicion, shall be obliged to exhibit as well upon the *high seas* as in the ports and *havens*, not only her passports, but likewise her certificates, expressly shewing that her goods are not of the number of those which have been prohibited as contraband;" and also the 23d article of the same treaty as follows: "It shall be lawful for all and singular the subject of the most christian king, and the citizens, people, and inhabitants of the

said *United States*, to sail with their ships with all manner of liberty and security, no distinction being made, who are the proprietors of the merchandizes laden thereon, from any port to the places of those who now are or hereafter shall be at enmity with the most christian king, or *United States*; it shall likewise be lawful for the subjects and inhabitants aforesaid to sail with the ships and merchandizes before mentioned, and to trade with the same liberty and security from the places, ports, and havens of those who are enemies of both or either party without any opposition or disturbance whatsoever, not only direct from the places of the enemy aforesaid to neutral places, but also from one place belonging to any enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same prince or under several. Also the 25th article, both in *French* and *English*:"* "To the end that all manner of dissentions and quarrels may be avoided and prevented on the one side and the other, *it is agreed* that in case either of the parties hereto should be engaged in war, the ships and vessels belonging to the subjects or people of the other ally must be furnished with sea letters or passports, expressing the name, property, bulk of the ships (*of the said ship*) as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties, which passports shall be made out and granted according to the form annexed to this treaty: these passports shall be renewed (*they are likewise to be renewed*) every year in case the vessel returns home in the space of a year (*that is, if the ship happens to return home within the space of*

* There being some difference between the *English* and *French* copies annexed to the treaty, the translation of the *French* copy is stated here as text, and the various readings of the *English* copy, annexed to the treaty, are inserted in *italics* between brackets.

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a year). It is likewise agreed that such ships, being laden, are to be provided not only with a passport (*with passports as above mentioned*) but with certificates containing the [*several*] particulars of the cargo, the place from whence the ship sailed, [*and whither she is bound that so it may be known whether any contraband goods be on board the same*], and an account of such article of contraband as he has on board, which certificates shall be made out by the officers of the place from whence the ship set sail; and if any one shall think it fit or adviseable to express in the certificate, the persons to whom the goods on board belong, he may freely do so." Also the 27th article viz. "That if the ships of the said subjects, people or inhabitants of either of the parties, shall be met with, either sailing along the coasts or on the high seas, by any ships of war of the other, or by any privateers, the said ships of war or privateers, for the avoiding of any disorders, shall remain out of cannon-shot, and may send their boats aboard the merchant-ship which they shall so meet with, and may enter her to the number of two or three men only, to whom the master or commander of such ship or vessel shall exhibit his passport, concerning the property of the ship made out according to the form inserted in this present treaty; and the ship, when she shall have shewed her passport, shall be free and at liberty to pursue her voyage, so as it shall not be lawful to molest or search her in any manner, or to give her chase, or force her to quit her intended course." The special verdict then stated the *American* act of Congress, 20th *July*, 1796, imposing a duty upon tonnage, to take place after the 1st of *September*, 1790, on all vessels entering an *American* port, viz. on the ships of the *United States*, 6 cents per ton; on vessels built within the *U. S.* but belonging wholly or in part to subjects of foreign powers, 30 cents per ton; and on other ships 50 cents per ton. Also, an act of congress, passed the 31st *December*, 1792, for the registry of vessels to take place after the last day of *March* then next, enacting that ships registered under a certain

act, entitled, &c.; and those registered under that act, and no other, except such as are duly qualified for the coasting trade and fisheries, shall be denominated and deemed ships or vessels of the *United States*, entitled to the benefits and privileges appertaining to such ships or vessels, provided they shall not continue to enjoy the same longer than they shall continue to be wholly owned and be commanded by a citizen of the *U. S.* and which, in effect, directs that vessels, built or not built in *America*, after the 4th day of *July*, 1776, and belonging wholly to citizens of the *United States*, or ships not *United States*-built, but on the 16th of May, 1789, and thenceforth belonging to citizens of the *U. S.* or vessels duly captured or forfeited, and so belonging to such citizens, may be registered, and no other; provided that they be not entitled to be registered, or to the benefit of registry, if owned wholly or in part by such citizen residing abroad, other than foreign consuls or partners in *American* houses of trade, &c. And that, in order to such registry, an oath shall be taken by the owner, &c. before the registering officer, declaring, to the best of his knowledge and belief, the name, burthen, and built of the vessel, the year when built, &c. when transferred to a citizen of the *U. S.* or captured or forfeited, producing a copy of the condemnation, authenticated in the usual forms, and declaring his, her, or their place of abode; and if he or she be the sole owner, or who is owner, &c. with their names and abodes, and that he, so swearing, is a citizen, &c. and whether any owner resides out of the *U. S.* &c. And that there is no foreign subject, directly or indirectly, by way of trust or otherwise, interested in any such ship, or the profits or issues thereof: and that the master or commander thereof is a citizen of the *U. S.* and the manner in which he is so; subject to the forfeiture of the ship and tackle, &c. in case the same is false, within the knowledge of the person so swearing, &c. That when the master is changed, the owners shall report such change to the collector of the district, &c. where the said vessel shall first be after-

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wards, and shall make oath that the new master is a citizen of the *U. S.* and shall indorse the same upon the certificate of registry to be then produced, &c. subject to a forfeiture of the registry, and a fine of 100 dollars, on the master, in case the said oath be not so made, &c. That if any ship shall be transferred, in whole or in part, to or in trust for a foreign subject, and the same be not made known, as before directed, such ship, &c. shall be forfeited, with a saving of the rights of any citizen and owner not knowing of the sale; that upon the entry of every ship of the *U. S.* at the port of any owner's residence, he shall make oath that the register contains the names of all the owners, and whether the ship has since been transferred, and that no foreign subject has, to his belief, any share therein, by trust or otherwise; and if no owner shall reside at such port where the ship shall enter, the master shall make the like oath, otherwise such ship shall not be entitled to the privileges of a ship of the *U. S.* But whether, &c. Damages assessed conditionally at 523*l.* 13*s.* 6*d.* costs, 40*s.* Continuance and judgment for the *defendant*, and damages adjudged to the *defendant*, by occasion of the premises, to 230*l.* by the direction of the justices here to the said *defendant*, at his request, for his costs and charges, by him, &c.

Bill of Exceptions.

Bill of Exceptions, stating that the counsel for the *defendant*, in order to prove that the said ship, with her cargo, were proceeded against by the captors in the provisional tribunal of prizes in the island of *St. Domingo*, and that a sentence of condemnation was pronounced by the said tribunal; and in order to prove the contents of the said sentence, proved that in consequence of an application to the attornies for the *plaintiffs* by the attorney for the *defendant*, to furnish the *defendant* with all such papers and documents as tended to shew who were interested in the said ship and in her said cargo, and in what manner they were lost, the said *plaintiffs* by their attornies sent the following letter: "*Mount Vernon.*—Messrs. *Smith*, &c. herewith send the only two letters which the *plaintiffs* have received from Messrs. *Hil-*

lings and *Francis* subsequent to the letter of the 17th *September*, relative to the above ship.—The copy of the sentence inclosed in the letter of the 12th of *November*, appears an imperfect document: no authentic copy is yet arrived—28th day of *January*, 1797:" and the said *plaintiffs* at the same time handed over and furnished to the *defendant*'s attornies, the paper described in the said letter, &c. viz. The condemnation of the ship differing in a few words from that above stated in the verdict. It stated also that, on a further application, the *plaintiffs*, by their attornies, wrote as follows: "Messrs. *Smith*, herewith send the undermentioned further papers received from *America*, 14th of *February*, 1797." Letter from *Willings* and *Francis* to Messrs. *Baring* and Co.; particulars of the cargo as unloaded from *Porto Rico*; copy of the privateer's commission; sentence of condemnation of the *Mount Vernon*.—Dated the 10th of *May*, 1797; and they handed over the said papers, and amongst others the said letters, viz. *Philadelphia*, 14th of *February*, 1797, "At length we are enabled to forward you the following documents relative to the condemnation of the ship, *Mount Vernon*, and her cargo."—A copy of the privateer's commission, certified by the *Spanish* government of *Porto Rico*, and translated from the *Spanish* language into *English* by our sworn interpreter. A copy of the sentence or condemnation, translated from the original in *Spanish*, certified also by the government of *Porto Rico*, and translated by the same interpreter. A certified copy of a document, granted by the government of *Porto Rico*, shewing the actual cargo landed from the ship corresponding with the manifest of her loading here with the exception of her necessary stores. Captain *Dominick* applied for further information, but could not obtain any other documents whatever; and indeed, had it not been for the interference of the government of *Porto Rico*, he could not have received the papers now sent, as of late the *French tribunals* in the *West Indies* refuse to the *Americans*, whom they capture, copies of their condemnation. It

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short, nothing now escapes them in the *West Indies*: even *American* vessels from neutral ports to neutral ports, are condemned, and the most scandalous reasons assigned; for a specimen of their proceedings, we refer to the sentence enclosed, which exhibits their new doctrines in a strong point of view. Upwards of 100 sail have been captured by them within the last six months, and when redress will be had is not known.—The protest and papers sent by *M. S.* will, with the addition of the enclosed, we presume, be sufficient to satisfy the insurers. We shall soon address you on the subject."—*W.* and *F.*—The copy of the sentence was then handed over, and is set out above and in the verdict. The *plaintiff*'s counsel tendered this paper as evidence that the ship was proceeded against and condemned in *St. Domingo*, and of her condemnation, and of the contents of the sentence, and the judge, Lord ALVANLEY, admitted it, and the jury without any other evidence in that behalf, did find, &c. as above.

Assignment of Errors.

The common errors were then assigned, and there was joinder in error.

This case was very elaborately and ably argued in *Hilary* and *Easter* terms, 1804, by PULLER, for the *plaintiffs*, in error; and R. CARR, for the *defendants*.

For the *plaintiffs* it was insisted principally as follows, viz. that the copy of the sentence, handed over by the attornies for the *plaintiffs* to the attornies for the *defendants*, was not sufficient evidence of the fact of condemnation and of the sentence; that though in some cases upon a notice to produce a deed at the trial, if produced, it is taken to be accredited by the party who produces it, and is admitted as good evidence, dispensing with some formalities of proof which are requisite when it is produced by the party who is to take advantage of it, yet the manner of delivering over this paper calling it a copy, did not, without something further done, give the *defendants* a right to use it in lieu of any other evidence of the con-

demnation. *Rex* v. *Inhabitants of Middlesex.** *Senate* v. *Porter.*† "This was a very imperfect document, and was stated to be so at the time. The handing it over was merely an accommodation to the parties, and the *plaintiffs* ought not to be bound by it. Lord *Kenyon* had a great jealousy towards admitting, as evidence, papers which had been handed over by one party, or his attorney, to the other. He said "instead of calling for these as evidence, get your admissions." Even admitting this to be evidence, there is nothing in the sentence to shew that the court of prize considered it as being any other than an *American ship*. The neutrality is not therefore fully negatived. The reasons given for the condemnation are utterly absurd if the ship was considered as a *British* ship, it proceeded therefore upon considering her as an *American* ship.‡

R. CARR, *contrà* argued that the letter containing an instrument stated to be a true copy, gave credit to that instrument as an authentic document, on which the *plaintiff* himself relied and desired the *defendant* also to rely. *Bowles* v. *Langworthy.*§

LAWRENCE, J. "You consider this as a *copy*; but a *copy* means a *transcript*, and this is a *translation*. Is there not some difference between these two things? You might have obtained what you really wanted, a true copy of the original, by applying to them for it. You might have put off the trial for that purpose until they delivered it to you."

CARR. "A neutral should navigate and document his

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* 2 Term Rep. 41. † 7 Term Rep. 158.

‡ As the judgment of the court proceeded upon another ground, we do not state these arguments at length.

§ 5 Term Rep. 366; and see 3 *East*, 222.

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ship according to the laws of the country to which he belongs, and also those of the country to which he is going, *Price* v. *Bell*,* *Lothian* v. *Henderson*,† *Rich* v. *Parker*;‡ for wheresoever a ship is fairly exposed to the lawful capture of any power, it is a breach of the warranty of neutrality with respect to that power. This ship, the *Mount Vernon*, sailed on her voyage in a false character, without a single document applicable to her real situation. She was the property of *Duncanson*, who was not an *American* citizen duly naturalized, nor entitled to be so at the time of her sailing. Many of the documents could only have been procured by means of false oaths, and if the sailing without any document at all is a violation of the warranty of neutrality, the sailing with a false document is equally so. The ship sailed in violation of the treaty, for the passport was made for the ship when it belonged to *Duncanson* only, which was not them according to the truth of the case, and it contains no statement of the habitation of the master. It is stated to be granted to "*G. Dominick*, master and commander of the ship *Mount Vernon*, of *Philadelphia*, of the burthen of 484 tons." This is a description of the ship and her port not a *descriptio honoris*, applicable to the commander. It is also false in stating that the ship was proceeding to *Hamburgh*, whereas it was determined that she should be sent to *London*. The treaty requires the destination of the voyage to be set out, and it is of the utmost importance to be known, in order to see whether the voyage is unlawful or not. The manifest and all the papers state the destination of the ship for *Hamburgh*; but the policy is to *London*, with liberty to touch at any port in the channel, and the jury find she was going to *Cowes*. It is true, they do not find expressly that she was not going to *Hamburgh*; but *destination* means not where a ship may go possibly, or where it is uncertain whether she will be sent or not,

* 1 *East*, 662. † 3 *Bos.* and *Pul.* 499. ‡ 7 Term Rep. 705.

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but where it is determined by the owners that she *shall go.*" He then proceeded to argue upon the effect and validity of the sentence, the authority of the court of prize, and the points upon which it was decisive. He cited 1 *Robinson* 126, 132, 282, 2 *Rob.* 362, *Wooldridge* v. *Boydel,** *Way* v. *Modigliani,*† *Lothian* v. *Henderson,*‡ *Bernardi* v. *Motteux.* §

Puller, in reply, referred again to *Henry* v. *Adey,* ‖ to shew the strictness which the courts require in the admission of a sentence, and argued at length, upon the effect of the sentence and the ambiguity and uncertainty, as well as the manifest absurdity and injustice of it. He said also that condemnation, as good prize, did not negative the ship's being an *American*; that the court rather proceeded on some presumption of hostilities by *America* towards *France*; that supposing the paper excepted against by the *defendant's* counsel as evidence must be admitted, yet it was not conclusive as a sentence, and it was not sufficiently authorized by the signature of the judge, for it was a sort of garbled extract. That it was only authenticated as an extract, but it did not clearly appear whether a full extract or a mere abstract: that the signature of the judge, at the bottom, could only go to authenticate the body of the certificate, and not the statement at the top of the sentence, which appears to be an extract by the person who *notifies* it; that though under the *American* tonnage acts certain requisites are necessary to entitle a ship to be considered as an *American* with respect to the payment of high or low port duties, yet a ship under the circumstances of the *Mount Vernon* might still be considered as an *American* ship. It was indeed held by the courts in *America* that this very ship was entitled to the protection of the *American* flag. That however improperly the documents

* Dougl. 16. † 2 Ves. Rep. 30. ‡ 3 Bos. & Pul. 499.
§ Dougl. 540. ‖ 3 East. 122.

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of neutrality were obtained, yet the *plaintiffs* might have produced such papers as they say would justly entitle the ship to be considered as an *American* with respect to *France*, such as a sea-brief, clearance and other things within the terms of the treaty. That the description of the habitation of the master, though not accurate, was yet sufficient for the purpose; for, *referendo singula singulis*, it contains a description of the habitation of *G. Dominick*, the master; and he is obliged to take the form of this passport as it is given him by the officer who makes it out, and therefore the court will endeavour to construe it so as to support the *plaintiff's* case. That in the *French* copy of the treaty, which is the original, it is not required to state the ship's destination, but only the place from which she comes.

Curia adv. vult.

In this *term*, the court requested the counsel to agree to have the form of the passport annexed to the treaty inserted in the special verdict, but it was said that the form stated in *Bird* v. *Appleton*, and other cases, was not the true one, and that *France* and *America* had differed concerning the form of this passport ever since the treaty was made. The special verdict, therefore, remained unaltered.

The judgment of the court was this day delivered to the following effect, by

Lord ELLENBOROUGH, C. J. "The principal arguments in this case have turned upon the points, whether according to the *American tonnage acts*, this ship is properly an *American* vessel, documented in such a manner as to be entitled to the privileges of an *American* ship? And, whether the evidence given of the ship's condemnation was properly received or not? The objection made to the form of the passport is sufficient to avoid the *plaintiff's* claim to recover; and when the case admits of our going further into the arguments employed in this case, it will then be necessary to state the record

more at length. [His lordship here stated a part only of the case] The 25th article of the treaty between *France* and *America* requires, that in case of war, 'the vessels or ships, belonging to the subjects or people of the other ally, must be furnished with *sea-letters* or passports, expressing the name, property, and bulk of the ships, as also the name and place of habitation of the master and commander of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties, which passports shall be made out and granted according to the form annexed to this treaty.' The special verdict finds the form of the passport on board the ship: in this passport there is no mention made of the habitation of the master, unless the words in the commencement in which it is stated to be 'granted to *G. Dominick*, master and commander of the ship called the *Mount Vernon*, of *Philadelphia*, of the burthen of 424 $\frac{71}{95}$ tons thereabouts, being at present in the port of *Philadelphia*, and bound for *Hamburgh*,' amount to a description of the habitation of the master. For, as the description in the policy clearly contains a warranty of the ship's being an *American*, it induces a necessity that she should be documented according to the treaty. As the special verdict has not found the form of the passport referred to in the treaty, we desired to see the form of such passport, if any existed. If we had thought it sufficient according to that form, the objection might have been got over, but in the absence of that form, we need only say whether the passport is sufficiently descriptive of the habitation of the master and commander, that is, whether the "*town* of *Philadelphia*" can be referred to *Dominick*, the master, or whether by the rules of construction, it does not refer to the ship. The rule of law as well as of grammar is, that every relative shall be taken to refer to its last antecedent. *Dyer's Reports Indictment*, 46, b. 68. Here the ship *Mount Vernon* is the last antecedent; but it is said that the words *of the town* apply to a person, and not to a thing or a ship. Yet, as a port may be within a town, there is nothing in the nature of the thing

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or of the construction of this sentence, to shew why it may not be referred to a town, as well as the habitation of a person may be so referred. But it does not depend upon this rule merely. The words, *of the burthen of* 424 *tons*, $\frac{97}{94}$ which immediately follow, clearly make it referrable to the ship only. Of this opinion, Lord ALVANLEY seems also to have been, in the case of *Baring* v. *Claget*,* although, as in that case there was a general admission that the ship, together with the usual documents taken out by *American* vessels, had the passport stated, Lord ALVANLEY thought fit to assume from that admission that she had on board a sea-letter or passport, with the name and place of habitation of the master, according to the treaty. Notwithstanding our present opinion, the *plaintiff* will have an opportunity of going against all the other under-writers if he can shew, by the form annexed to the treaty, that the ship was properly documented in this respect; and then all the other points will come in discussion.

JUDGMENT AFFIRMED.

LYON and Another *versus* MELLS.—*June* 19.

A. a common carrier by water, gave notice that "he would not be responsible for any loss or damage to any cargo put on board his vessels, unless it happened by want of ordinary care and diligence in the master or crew, and then only to 10*l. per cent. on the amount of the loss, and not beyond the value of the vessel and the amount of her freight; and that, if any persons desired to have goods carried free of any risk, in respect of loss or damage, whether by the act of God or otherwise, they must make a special agreement on payment of* extra *freight:" Held, that notwithstanding this notice, the carrier is answerable for the whole of any loss or damage arising by* his own *default, as in case the vessel, at the time of loading, be* leaky *and* not sea-worthy. *The notice applies only to losses by reason of the default of others, not of himself.*

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ASSUMPSIT to recover the amount of damage done to a quantity of yarn of the *plaintiffs*, delivered on

* 3 *Bos.* and *Pul.* 201.

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board a lighter of the *defendant's*, to be carried therein from a quay at *Hull* to a sloop of one *Wm. Barton*, lying in a dock there, and to be delivered on board the same for a reasonable reward, to be paid to the *defendant*. The declaration stated (amongst other things) a promise by the *defendant* that the lighter was *tight and capable of carrying the yarn*; also a promise by him that the lighter was, so far as he knew, a proper and substantial vessel, fit for carrying the yarn without damage; and also a promise by him to stow, load, and carry the yarn carefully and with due attention to the same. To this action the *defendant* pleaded *non-assumpsit*, and the same came on to be tried before Baron THOMPSON, at the last assizes for the county of *York*, when a verdict was given for the *plaintiffs*, subject to the opinion of the court on the following case:—"On the 10th day of *June*, 1802, several bales of yarn, belonging to the *plaintiffs*, were delivered on board the lighter, of which the *defendant* was the owner, in manner and for the purpose above mentioned. The *defendant* kept sloops for carrying other persons' goods for hire, and also lighters for the purpose of carrying those goods to and from his sloops, and when he had not employment for his lighters for his own business, he let them for hire to such persons as wanted to carry goods to other sloops. Previous to such delivery the master of the *defendant's* lighter, when he was applied to to fetch the yarn, undertook to bring it in the lighter to the sloop, and being asked if the lighter was fit to carry it, said it was very fit and tight, and that he had been down the day before with hemp and flax in her to some of the vessels at *South End*. In carrying the yarn in the lighter to the sloop, the lighter leaked, and some of the bales of yarn were thereby wetted and damaged, and on the arrival of the lighter at the sloop, the master of the lighter, on its being mentioned to him that he had got water in his boat, said there was a bit of a *weep* (meaning a leak) *abaft*. Three or four of the bales of yarn were stowed upon the top of the pump, by which it was rendered entirely useless until they were removed; before

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the second bale of yarn could be hoisted into the sloop, the lighter was going down, and would have sunk to the bottom of the dock with the rest of the bales, but was prevented, by getting tackle fixed to her to get her up. The damage thereby done to the yarn amounted to 274l. 16s. 4d. The lighter was not tight and sufficient for the carriage of the yarn, but was leaky; and the master of the lighter was *guilty of negligence in not stowing the yarn properly*. Previous to the shipping the yarn on board the lighter, the *defendant* published the following notice, of which the person who so shipped the yarn on behalf of the *plaintiffs* had notice, he himself being one of the persons who signed the same, viz. "*Navigation of the river Humber, and of the rivers falling into the same.*—To all merchants, tradesmen, and others.—We whose names are hereunto subscribed (by ourselves or by our respective agents) do hereby severally give notice, that we will not be answerable for any loss or damage which shall happen to any cargo which shall be put on board any of our vessels, unless such loss or damage shall happen, or be occasioned by *want of ordinary care and diligence in the master or crew* of the vessel, when and in such case we will pay to the sufferers 10l. per cent. upon such loss or damage, so as the whole amount of such payment shall not exceed the value of the vessel, on board whereof such loss or damage shall have happened, and the freight of such vessel: And we do hereby give this further notice, that any merchant or other persons, desirous of having their goods or merchandizes carried free of any risk, in respect of loss or damage, whether the same shall happen from the act of God or otherwise, may have the same so carried by entering into an agreement for the payment of an *extra* freight, proportionable to the accepted responsibility, on application to us or our respective agents.—*Hull, Oct.* 1, 1800." This notice was signed by the *defendant*, and by forty-nine other owners of vessels at *Hull*.—*Question*—Whether the *plaintiffs* are entitled to more than 10l. per cent. upon the above damages; if they are so entitled, the verdict to be

entered for the *plaintiffs* for 274l. 16s. 4d. if not, the verdict to be entered for the *plaintiffs* to the amount of 10l. per cent. upon the said damages.*

HOLROYD, for the *plaintiffs*, made two questions; first, whether this was a case within the notice at all, and whether the *plaintiff* was entitled to recover the full amount of the damage? and *secondly*, whether such a notice was good in law? "The master of the lighter said expressly that the lighter was in good condition, and fit to carry goods. This is an express undertaking by the master, and the owners are bound by it; for it must be within the nature of his authority; *Ellis* v. *Turner*.† But independently of this express undertaking there is an implied promise in law, in all these cases, that the vessel is *sea-worthy*, and this is so necessarily connected with the duty of the carrier and owner of the vessel that he cannot by any notice discharge himself from it. Then this is either a promise which the master made and was empowered to make, in contravention of and in addition to the agreement under the notice, and so binding, or if the notice does not extend to this case so as to except against the sea-worthiness of the vessel, then this is a loss, not by the default of the master and servants of the carrier, mentioned in the notice, but a loss by default on the part of the owner himself, by a negligence for which, he is liable at all events. It comes to this dilemma: either this is provided for by the notice or it is not. In the first case, the notice is void by law; in the latter, the *plaintiff* is entitled to recover nowithstanding the notice. The common law, from principles of obvious policy, im-

* The case was first argued, in part, in *Easter* term, when it was ordered to stand over, that it might be stated whether the *defendants* were common carriers. Accordingly, an alteration was made in the case as above.

† 8 Term Rep. 531.

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poses certain duties upon common carriers beyond those of persons in other employments. They are liable for a loss, though no kind of negligence is proved, except loss by the act of God and the king's enemies, "and so they would be," says Lord *Holt*, in the case of *Lane* v. *Sir Robert Cotton*,* "tho' they should expressly caution against it." At least they cannot alter the nature of this obligation without giving some consideration of advantage in lieu of it; such as taking for a less price than would be the proper reward of the care required in common carrying. But they are bound not to exceed the ordinary price, or they are guilty of extortion, and indictable. Here, they refuse to carry, except on limited terms, or else a price, by way of insurance is required, which they cannot lawfully demand. This is extortion. If this notice extends to the present case, the effect of it is, that they will not be answerable even for their own negligence, and in no case for more than 10*l.* per cent, which, if it is lawful, may be reduced by another notice to 1*l.* or 10*s.* per cent. Such a notice goes in substance to make the employer who sends goods liable for *nine-tenths* of the loss upon his goods, whereas at common law he is not liable for any thing, but the carrier must stand to the whole loss. This is either unlawful, or at least there must be some consideration of *quid pro quo* given, to make such a notice binding as an agreement. He cited and commented upon, *Kirkman* v. *Shawcross*,† *Oppenheim* v. *Russel*,‡ *Clyde* v. *Mersey Navigation*,‖ and *Fenn* v. *Harrison*.

THE COURT observed that his arguments went to shew that the notices in *Clay* v. *Willan*,§ *Yate* v. *Willan*,¶ *Izod*

* 12 *Mod.* 1 *Salk.* 81. This case is overruled only upon special grounds with respect to the postmaster-general, in *Whitfield* v. *Lord Le Despencer*, *Cowper*, 754.

† 6 Term Rep. 14. ‡ 3 *Bos.* and *Pul.* 42. ‖ 1 *Espinasse*, 36. *H. Bl.* 198. ¶ 2 *East*, 123. § 4 *East* 371.

v. *Mountain*, and other cases, were illegal, and that it did not appear that in any of those cases concerning the liability of carrying to the amount of only 5l. there was any consideration given by the carriers.*

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GASELEE, *contrà*, contended that the *defendants* were not answerable for the damage beyond 10l. per cent. according to the terms of their notice with which the *plaintiff* was perfectly cognizant. "This being an express agreement extinguishes any right which the *plaintiff* might have had upon the ordinary implied contract at common law. The representation of the master could not alter this agreement, for he was not empowered to make a new agreement; and the terms of the notice cannot be altered without a new express agreement between the *plaintiff* and the *defendant*, or a person properly authorized by the *defendant*."

Lord ELLENBOROUGH, C. J. "May it not be within the scope of the master's authority to make a representation as to the condition of the vessel which it may be material for me to know, and is not the owner of the vessel bound by it? This is not even within the scope of the advertisement or notice. The notice applies only with respect to goods put on board. But if, before they are put on board the owner of them inquires, and he finds the vessel is not sound, he will not put them on board at all. Then is not the owner of the vessel, in such case, answerable for the representation made by the master as to the seaworthiness of the ship, which is the inducement to the putting of the goods on board?"

GASELEE. "The master's authority is limited by the advertisement. *Fenn* v. *Harrison*."†

* I did not clearly understand the distinctions he made in this part of his argument.

† 3 Term Rep. 757; 4 Term Rep. 177.

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Lord ELLENBOROUGH, C. J. " In that case, the party was only a special agent for a particular purpose, he was only authorized to get a particular bill discounted, but he gave an *indemnity* with it."

GASELEE, cited the cases of *Yate* v. *Willan*, *Clay* v. *Willan*, *Izod* v. *Mountain*, *Tyler* v. *Morris*,* *Titchbourn* v. *White*,† *Gibbon* v. *Paynton*,‡ and *Kent* v. *Egglestone*,§ to shew that a common carrier may make a special acceptance of goods to be carried by him, as in case of money, jewels, &c. and, therefore, he contended that the terms of the notice in this case were lawful, and such as the carrier might impose upon his customers.

LAWRENCE, J. " If the carrier is bound to carry for a reasonable reward and, like an innkeeper, with respect to guests, must be open to all comers, unless he is full, then the cases of special acceptance must be understood with some limitation as only applying to cases where the other party has assented to it by delivering the parcel to be carried upon those terms."

Lord ELLENBOROUGH, C. J. " If the carrier is at liberty to refuse absolutely to carry *money*, he may also refuse to carry any thing else; but he is bound to take for a reasonable reward. There must be, therefore, some limitation. A bill was brought into parliament to alter the law with respect to ship owners, but it was thrown out by the Lords, chiefly upon the representation of the Law Lords, that the parties might relieve themselves against the liability to the full extent, by a special notice and agreement. This caused an alteration in the bills of lading, and also several public notices which are mentioned in several cases in this court."‖

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* *Carthew*, 585. † 1 *Str.* 45. ‡ 5 *Burr.* 2498.
§ *Allen*, 93.
‖ *Abbott on Shipping*, 233. *Smith* v. *Shepherd.*

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Gaselee, then submitted that either the notice was not illegal so that at least the party who had submitted to it must be bound by it, or if the *plaintiff* insisted upon a right to have his goods carried upon other terms, instead of bringing this action, he ought to have said, "I will not deal with you on the terms of the *advertisement*, but I will consider you as a common carrier, and I will compel you to carry my goods on the ordinary terms of a common carrier;" and then if the *defendant* refused, he might have brought an action upon the case against him for refusing to carry his goods.

Lord Ellenborough, C. J. "It is probable we may be able to decide this case upon the special representation of the master, which I am inclined to think he was empowered to make; but if it should be necessary to decide it upon general principles, it is a case of great importance.

Cur. adv. vult.

And now the opinion of the court was delivered to the following effect, by

Lord Ellenborough, C. J. After stating the case, "The general question submitted to our determination is, whether the *plaintiffs* are entitled to more than 10*l.* per cent? That they are entitled to recover 10*l.* per cent. the case expressly admits. On the part of the *plaintiff*, it has been argued that either the notice itself is illegal and not binding, or in point of fact this case does not fall within the notice. We are all of opinion, admitting the notice to be valid, that the circumstances do not, as stated in this case, bring the *plaintiffs'* loss within the terms and meaning of such notice. In every contract particular terms essential to it are ingrafted by implication of law, and it is a term in this contract, implied by law, that the vessel itself is *tight* and fit for the office and purpose for which it is employed. It is the very foundation and main support of the contract between the parties that it should be so. The declaration, in this case, states such

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a promise to be made by the *defendant*; and it is proved by shewing the nature of his employment. In other words, it is implied in law. And if it turns out not to be complied with in fact, this we consider as a personal negligence in the owner for which he is answerable; or more properly, it is that which he has undertaken to do and a term which he must himself see is complied with. Now consider the terms of the notice. [His lordship read the notice.] I have before stated this is merely a neglect in the owner of the vessel; it does not therefore come within the exception as to that loss, for which the owner of the goods is to be paid at the rate of 10l. per cent. only. It does not come within the meaning of the words, *a loss or damage occasioned by want of ordinary care or diligence in the master or crew of the vessel.* The counsel for the *defendant* seemed to admit, in this case, that if it was to be considered as a neglect of the owners themselves, they would be answerable; for he admitted, that if the owners had been present at the time when the representation was made by the master of the vessel, they would be liable upon the undertaking that the vessel was tight. As this is not a neglect of the master it is impossible to make the owners liable for any part of the loss in this case, not even for their servants' negligence, up to 10l. per cent. if it is understood that for their own negligence they are not to be liable at all. If these terms were admitted they would not be bound even to find a crew sufficient to work the vessel; and as their responsibility can never exceed the value of the vessel and the freight, they would find a leaky vessel, and so by their own fraud, not render themselves liable, in any possible case, for so much even as the 10l. per cent. which they hold out as the utmost limit. Then, how is the case affected by the clause with respect to the additional freight; and does that clause take the case out of the responsibility of the owner? It is addressed to those losses which may arise *by the act of* God *or otherwise.* Such increased *freight*, therefore, can only be payable for that which is an object of risk, that which may arise from accident or chance, and not that which is certain or nearly so; such as is the

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case of a leaky vessel unfit for the purpose of carrying goods. Every agreement also must be so fairly construed that the parties shall not be able to take advantage of their own wrong; and construing this agreement in its terms, according to the fair meaning of the parties, it was clearly the object of the parties to secure themselves against loss in those cases only where the law would have made them answerable for the acts of others, and not where they would be answerable for their own acts. This case, therefore, is not within the notice, and the

VERDICT MUST BE ENTERED FOR THE WHOLE SUM.

BLOXAM, Knight, and two Others *versus* HUBBARD.

19th *June*.

Where one of four assignees of a bankrupt is removed by order of the Lord Chancellor, *without appointing another, or a new assignment being made by the commissioners, or a re-assignment by such removed assignee, the three remaining assignees cannot maintain trover for the whole of a ship belonging to the bankrupt, but only for three-fourths thereof, for the whole property in the bankrupt's effects is not vested in them by such order of removal alone.*

The statute, 34 Geo. III. *c.* 68, *s.* 15 *and* 16, *applies to any alteration of property in a ship, whether in the whole or part thereof, and if the whole of a ship at sea be transferred to a purchaser at another port, who intends to obtain a register* de novo *at such other port, he must comply with the forms prescribed in the* 16*th section of that statute.*

Bloxam, Knt. and Others. versus Hubbard.

THIS was an action of *trover*, to recover two third parts of the ship *Fishburne*, tried before Lord ELLENBOROUGH, after *Hilary* term, 1804, at *Guildhall*; verdict for the *plaintiffs*; damages 2326*l.* 6*s.* 8*d.* and costs 40*s.* subject to the opinion of the court upon the following case:—"*Thomas Ward*, the bankrupt, being the origi-

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nal and sole registered owner of the ship *Fishburne*, belonging to the port of *Newcastle-upon-Tyne*, cleared the said ship outwards for the *Baltic* in *April*, 1800, where she was detained for a considerable time by the embargo of the Emperor of *Russia*. On the 9th of *November*, 1801, *Ward*, by regular bill of sale, assigned the whole ship, *Fishburne*, then at sea, in consideration of 4000l. to the *defendant*, who then resided in *London*. The grand bill of sale of the whole ship was also delivered to the *defendant*. On the 2d of *December*, 1801, *Ward* committed an act of bankruptcy, upon which a commission afterwards issued against him, and he was duly declared a bankrupt. On the 2d of *January*, 1802, the *defendant* registered the said ship, *de novo*, in the port of *London*, and the original certificate granted to *Ward*, which purported, on the face of it, to be of the ship *Fishburne*, belonging to *Newcastle-upon-Tyne*, was delivered up and cancelled. On the 19th of *February*, 1802, the *defendant* sold the whole of the said ship by public auction to *Thomas Brown*, *Robert Brown*, and *Thomas Old*, for 3630l. (the net proceeds being 3489l. 10s. 8d.) and by bill of sale of the 5th of *April*, 1802, assigned her to them, who afterwards sent her to sea, where she was lost on the 20th of *February*, 1803. The *Fishburne* never returned to the port of *Newcastle-upon-Tyne* since she cleared outwards from that port for the *Baltic* in *April*, 1800; but the embargo being taken off, she arrived at *Plymouth*, but before the execution of the bill of sale by *Ward* to the *defendant*, she sailed again, and was absent at the time of the execution thereof. She afterwards returned to the port of *London*, and immediately thereupon the *defendant* obtained a new register. No transfer of property in the same ship, or any part thereof, appears in any document of the custom-house of *Newcastle-upon-Tyne*, to the *plaintiffs*, or on the certificate of the ship's registry, nor have the *plaintiffs* taken out a new register; and no demand was proved on the trial to have been made of the said ship upon the *defendant*. The *plaintiffs*, together with one *John Glen Johnson*, were appointed assignees of

the estate and effects of the said *Thomas Ward*, under the above mentioned commission, by an assignment, dated the 13th of *April*, 1802. On the 22d of *January*, 1803, the LORD CHANCELLOR, by his order, removed the said *John Glen Johnston* from being an assignee, which order reciting that a petition had been presented to the LORD CHANCELLOR by the *plaintiffs*, being *three* of the creditors and three of the assignees, stating that the said *John Glen Johnston*, on or about the 7th of *December*, 1801, being prior to the date of the said commission, received from the bankrupt, whilst he was a prisoner for *debt* in the *King's Bench* prison, and after the said *Thomas Ward* had committed one or more act or acts of bankruptcy, certain bills of exchange, which bills the said *John Glen Johnston*, contrary to his undertaking to that effect, had refused to be delivered up for the benefit of the estate of the said *Ward*; and that the said *John Glen Johnson* had departed these kingdoms, and was, as the petitioners were informed and believed, gone to *Petersburgh*, in *Russia*; and praying *(inter alia)* that the said *John Glen Johnston* might be discharged from being one of the assignees of the estate and effects of the said *Thomas Ward*, concluded as follows: "Now, upon hearing the said petition read, and what was alleged by the counsel for the petitioners, I do order that the said *J. G. Johnston* be forthwith removed from being an assignee of the said bankrupt's estate and effects, and let him and his partners be restrained from receiving any dividend upon their debt proved under the commission against the said *Thomas Ward*, until my further order.—ELDON, C." No reassignment, release, or other instrument, hath been executed by the said *J. G. Johnston* to the *plaintiffs*, nor any new assignment by the commissioners in consequence of the said order. *Question*—whether the *plaintiffs* are entitled to recover in this action?

HALL, B. for the *plaintiffs*. 1st. *The action is well brought in the names of the present plaintiffs.* On the

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death of any one assignee his interest survives to the remainder, and so upon a removal of an assignee, even without a reassignment and without appointing another in his place. Stat. 5 *Geo.* II. c. 30, s. 31. *Cooke's Bankrupt Law.** *Ex parte Bainbridge.*† Even if it were not so, this is an action of *tort*, and one assignee may bring it without the others' joining, for the objection can only be taken advantage of by plea in abatement; *Sedgworth* v. *Overend.*‡ And the assignees have a good title to a ship belonging to the bankrupt vested in them by operation of law, without being compelled to take out a register; for the registry acts do not apply to the case of a transfer by bankruptcy. Secondly, *The defendant has not a good title.* The requisites of the registry acts were not complied with by the *defendant* after the bill of sale from *Ward.* *Heath* v. *Hubbard,*§ *Moss* v. *Charnock.*‖ And if the requisites of the act were, in fact, complied with, by merely taking out a new register, that was not done till after the bankruptcy, and so could not pass a good title to the ship as against the assignees. Thirdly, *There is a sufficient conversion.* This depends on the second point, for if the *defendant* has not a good title, his possession is a conversion, or if not, the sale of the whole ship is a conversion. *Cooper* v. *Chitty.*¶ Fourthly, Though no demand was made of the ship by the *plaintiffs* on the *defendant*, a demand in this case was not necessary." Having stated these points, he referred the court to the case of *Heath* v. *Hubbard*, to shew that the *defendant* had not complied with the registry acts so as to give him a good title.

SCOTT, W. *contrà*. "First, there should have been a new assignment by the commissioners to the other assig-

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* Precedents of Assignments, vol. ii. 142. † 6 *Ves.* jun. 451.
‡ 6 Term Rep. 766. See also *Addison* v. *Overend*, 7 Term Rep. 279.
§ 4 *East*, 110. ‖ 2 *East*, 399.
¶ 1 *Bur.* 20.

nees. When any one is put out by the order of the CHANCELLOR, that order is not sufficient to devest the title out of the old assignee until he has reassigned. The stat. 5 *Geo.* II. c. 30, s. 36, gives the CHANCELLOR the power in this case; but the order here does not pursue the directions of the statute. Secondly, the sale of the ship, in this case, is not a tortious conversion. It is clearly not so against the bankrupt himself; for this is a *bonâ fide* delivery of the ship by the bankrupt to the *defendant*,* and the assignees stand precisely in his place. Thirdly, the assignees ought to have completed their title by obtaining a register. The assignment to them by the commissioners, is as much a transfer of property within the registry acts as any ordinary sale, and the assignees of a bankrupt are bound by the same rules with respect to conveyances of property, in order to complete their titles as other persons. In cases under the statute 13 *Eliz.* c. 7, they must pursue the directions of the statute; in cases of copyholds, they must convey the same as other persons; *Drury* v. *Man.*† Fourthly, the *defendant* has done every thing requisite to complete his title, and the decision in *Heath* v. *Hubbard*,‡ proceeded upon a mistake. The stat. of 7 and 8 *W.* III. c. 22, s. 21, directs a particular mode of transferring the property in ships in two cases. The first is, where there is a sale of the whole of the ship, or of part, to a person in *another port*; and the second where there is a sale of one or more parts or shares to another person in the same port. In the first case, it is to be done by delivering up the certificate of registry to be cancelled, and taking out a new one, and cannot be done by indorsement on the old certificate. In the second case, it is to be done by an indorsement on the old certificate. This statute has never been altered in these respects by any subsequent acts, and it is absurd to require that the sale should be witnessed by an indorsement on an instrument, which, as in the case of a

* 1 *Ves* jun. 416.

† 1 *Atkyns*, 95.

‡ 4 *East*, 110.

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transfer to another port, is directed to be delivered up to be cancelled. In the judgment of *Heath* v. *Hubbard*, the court observing upon the statute 34 *Geo.* III. c. 68, s. 16, says, that 'If any vessel shall be at sea, or absent from the port to which she belongs at the time when such,'—that is, 'any alteration in the property thereof, shall be made as aforesaid, then the requisites of that clause must be fulfilled.' But this is a mistake in supposing that the 15th section, to which this 16th section applies by reference, contained the word *any*, and was also applicable to *any* alteration of property (for *such* cannot mean *any* in common parlance;) whereas, the 15th section applies only to the cases to which the recited statute, the 7 and 8 *W.* III. c 22, s. 21, applies, and that is only to an alteration of property, of a share or shares, in the same port. The 16th section, therefore, applies only to *such* and the same transfer or alteration of property, in respect of any share or shares in the same port, in case the ship is at sea and absent from her port; and not to the present case of a transfer of the whole ship to *another port*, made during her absence from the port to which she then belonged."

LE BLANC, J. "Suppose the ship is to trade to the same port, but the owner resides at another port."

SCOTT. "In that case the register may be at either port; but this 16th section cannot apply to the present case, because an indorsement is to be made on the old certificate when the ship *returns* to her port, whereas the ship here does not return to her port, and it would be absurd to require an indorsement to be made on an instrument which is to be delivered up to be cancelled. Section 15 only describes a certain form of indorsement, and the 16th section, referring to it, provides for the mode of indorsement in case the ship is at sea; which may, therefore be made ten days after her return." He contended also that the case of *Moss* v. *Charnock*, would not apply, because, in this case, a good title was made by the bill of sale from the bankrupt and the subsequent register, whereas there a good title was not made, previous to the bank-

ruptcy. He also made some observations upon the statute 34 *Geo.* III. c. 68, s. 22, and said that it could not apply to the case of a transfer to a foreigner, mentioned in the recital, because a foreigner could not be entitled to have a register *de novo*, which that clause directs to be taken out.* And he concluded by relying principally on the two following points, viz. First, the order of the LORD CHANCELLOR did not give the *plaintiffs* such a title in the whole ship as to enable them to bring *trover* without the other assignee; and, secondly, this being the sale of a whole ship, transferred to another port, there was no act applicable to the case but the statute 7 and 8 *W.* III. c. 2, s. 2; and that statute required only a register *de novo*, which was obtained in this case.

HALL, in reply, relied on *Moss* v. *Charnock*,† as an authority for the *plaintiffs*; for, admitting that a register *de novo* was sufficient to complete the *defendant's* title, yet that was not obtained till after the bankruptcy, and that case requires all the formalities to be performed before the bankruptcy, in order to complete the title, and if performed afterwards it says they have no relation back to any previous time when the bill of sale is made. That even the 7 and 8 *W.* III. c. 2, was not complied with; for that statute was incorporated into, and in part altered by the subsequent statutes, which make further requisites necessary, and the *register de novo*, required by the first act, cannot be obtained without pursuing all the additional formalities required by the latter acts; otherwise those acts would be perfectly nugatory. That by reference from the 16th section of 34 *Geo.* III. c. 68, to the 15th section of the same act, it would appear that it was

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* Mr. *Abbott*, in his *Treatise on the Law of Merchant Ships*, p. 92, says, this clause is strangely drawn, and he is not clear that he understands it.

† 2 *East*, 399.

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[illegible]
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applicable to *any* alteration of property, whether in the whole or in part of a ship. He referred also to the case of *Heath* v. *Hubbard*, and again briefly noticed the other objections.

Cur. adv. vult.

And now the opinion of the court was delivered to the following effect, by

Lord ELLENBOROUGH, C. J. After stating the case; "Three objections have been taken in this case founded partly on a supposed defect in the title of the *plaintiffs* to bring this action, and partly in supposing that the *defendant* himself has a good title to the ship. These objections are first, that *J. G. Johnston* ought, notwithstanding the order of removal by the LORD CHANCELLOR, to have been joined as a *plaintiff* in the action, and that a new assignment by the commissioners, or a reassignment by him, was necessary to devest the property out of him; secondly, that there is no conversion to enable the *plaintiffs* to bring trover; thirdly, that the *plaintiffs* ought to shew a title in themselves by complying with the statutes concerning the registring of ships, by taking out a new register, even supposing the *plaintiffs*' right to recover not to be defeated by the sale from *Ward* to the *defendant*, and that the *defendant* had not a good right in virtue of his purchase under that sale. As to the first of these objections, it has only the effect of precluding the *plaintiffs* from recovering more than 3-4th parts of the amount stated in the verdict; for it is now well settled in the courts of law that the *defendant* cannot preclude the *plaintiffs* from recovering in tort for the *conversion* with respect to their *shares*, except by plea in abatement, as was decided in the case of *Sedgworth* v. *Overend*.* As to the second question, If in the result of this case it appears that the *defendant* had no title when he sold the ship by public auction, and afterwards assigned her to

* 7 Term Rep. 279; and see also *Nelthorpe* v. *Dorrington*, 2 *Lev.* 113, which is directly in point.

the purchasers, who sent her to sea, where she has been lost, this is a conversion, and if it is not, it will be very difficult against any *defendants* to state a conversion to their own use. And though after the sale, by *Ward*, he could not complain of a wrongful conversion, yet his assignees may maintain trover: for it is not true that the assignees can maintain no other action than the bankrupt can. On the contrary, the bankrupt cannot recover the possession of goods delivered by him to another in contemplation of bankruptcy, but the assignees may; and many other instances may be given. As to the third objection, namely, that the assignees ought to have derived property to themselves, by means of an assignment from the commissioners and a registry under the registring acts, it is an objection which would defeat every conveyance to the assignees of bankrupts since the passing of the registry acts, for no such conveyance ever was completed by means of a registry as is now required. But this is indeed not necessary. The acts of registry only relate to transfers by the parties, and do not relate to assignments by operation of law. For the commissioners are not *former owners*, according to the description of the persons to whom those statutes apply, and do not sell in the sense of the words used in the statutes; although in pursuance of the more recent statutes relating to bankrupts, they formally *make sale thereof* in the general conveyance of the bankrupt's property by bargain and sale enrolled. The indorsement required by the 15th section of the stat. 34 *Geo.* III. c. 68, shews that the sale meant in the statutes is a sale by a former owner to a new owner. The very form of it shews this. 'Be it remembered that we [*names, residence, and occupation of the persons selling*] have this day sold and transferred all our right, share, or interest in or to the ship mentioned in the within certificate of registry.' But how can the commissioners of a bankrupt be considered as selling any interest of their own? Their property in the thing conveyed is neither legal nor equitable. Whatever passes by their assignment passes *not by them*, but rather *through them*, and these

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acts relate only to transfers between *buyers* and *sellers*. Supposing therefore, that the *plaintiffs* are entitled to bring their action, it remains to consider the question, whether the *defendant* has a good title to the ship? This depends on the provisions of the statute 7 and 8 W. III. c. 22; so far as respects the transfer of the entire property in a ship and so far as the same are applicable to the case of a transfer when at sea or in her absence from her port. The statute 7 and 8 W. III. c. 22, s. 21, provides that no ship's name, registered, shall be changed without registring such ship *de novo*, which is *thereby* required to be done upon every transfer of property to another port, and delivering up the former certificate to be cancelled; and that "in case there be any alteration of property in the same port, by the sale of one or more shares in the ship after registring, such alteration shall be acknowledged by indorsement on the certificate of the register before two witnesses, in order to prove that the entire property in such ship remains to some of the subjects of *England*, in case any dispute arises concerning the same." Here is no provision that the indorsement is to be made on a partial sale in another port; for a new register is only to be made on the *transfer* to another port. The 36 Geo III. c. 60, s. 16, recites "the provisions of the said recited act, namely, the 7 and 8 W. III. c. 22, touching the indorsement on certificates of registry in case of *any* alteration of property in any ship or vessel in the same port, being found insufficient, and directs, that besides the indorsement required by the said recited act, there shall also be indorsed on the certificates of registry, before two witnesses, the town, place, or parish where all and every person and persons to whom the property in *any* ship or vessel, or *any part* thereof, shall be *so* transferred, shall reside." "And, the person or persons to whom the property of such ship or vessel shall be so transferred, or his or their agents, shall also deliver a copy of such indorsement to the persons authorized to make registry, who are to cause an entry thereof to be indorsed on the oath or affidavit upon which the original certificate of registry of

such ship or vessel was obtained, and shall also make a memorandum of the same in the book of registers. This clause then applies to the transfer of the property *in a ship, or any part thereof.* It has the effect of applying the act 7 and 8 W. III. c. 21, to a transfer of the whole, *or any part of a ship,* and is therefore either a legislative exposition of that statute or an enlargement of it. The statute 34 *Geo.* III. c. 68, s. 15, which prescribes the form of the indorsement, recites that "whereas by the laws now in force, upon *any* alteration of property, in *any* ship or vessel in the same port to which such vessel belongs, an indorsement upon the certificate of registry is required to be made;' and then enacts, 'that such indorsement shall be made in the form therein expressed, and shall be signed by the persons transferring the property, and a copy of such indorsement shall be delivered to the person authorized to make registry, otherwise such sale shall be void, and he shall cause an entry to be indorsed on the oath on which the original certificate was obtained, and also make a memorandum in the book of registry," &c. This clause, therefore, considers the indorsement to be necessary on any transfer of property in the same port, and this act confirms the former provisions of the other acts, and prescribes the form of the indorsement. Now this indorsement, when in port, is put in opposition to the case of a sale when the ship is at sea; in which case the indorsement cannot be made on the register. For that purpose the 16th clause is introduced, which applies to a sale in such case, and provides that "if any ship shall be at sea, or *absent from the port to which she belongs, at the time when such alteration in the property thereof shall be made as aforesaid,* so that an indorsement cannot be made on the registry immediately, the sale or contract shall be made by bill of sale (as before directed), and within ten days after such ship shall return to her port, an indorsement shall be made and signed by the owners, and a copy thereof delivered in manner therein before directed, otherwise such sale shall be void, and

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entry thereof shall be indorsed and a memorandum thereof made in the manner before directed." The alteration here mentioned, by reference to the preceding section, is *any alteration of property;* any alteration by which any property is transferred in a ship absent from her port. Otherwise this mischief might follow—the whole of a ship might be transferred to a foreigner, and if she did not change her port, he might be permitted to possess all the advantages and privileges of a *British* subject. But this cannot be if the bill of sale is to be made in form, and to be entered with the person making registers, and notice is to be given to the commissioners of the customs. And in *Macneal's* case (*Reeve's History of Shipping*, 504) Lord *Camden*, then president of the privy counsel, said that "he thought that the stat. 26 *Geo.* III. was an act which in every view of it should be considered as a remedial act, it was for preventing a public mischief, to amend and alter the stat. 7 and 8 *W.* III. It had appeared that frauds without number were committed under that act, and that was stated to be the reason of making it." Thus collecting the intention as well as the terms of these acts, we are obliged to consider the statute 34 *Geo.* III. c. 68, s. 16, as applying to *any* alteration of property with respect to a ship at sea, or when absent from the port to which she belongs, and as applying also to *any* alteration of property in such ship, whether the same be made by transfer of the whole, or of any share or shares. As such mode of proceeding as this clause of the statute directs has not been taken upon the sale to the *defendant*, we think that no interest has passed therein by such sale from the bankrupt; and that the *plaintiffs* are entitled to recover to the extent of three-fourth parts of the sum mentioned in the case. The whole amount in the verdict being thus altered, we direct

THE POSTEA TO BE DELIVERED TO THE PLAINTIFFS.

POSTAN (executor) *versus* STANWAY (executor) *June* 6. 1804.

The defendant, *an executor, pleaded the general issue, the statute of limitations, and also, as to* 15*l.* 15*s. part of the* plaintiff's *demand, that the undertaking was made by the testator and one* J. H. *jointly, and this last plea was, upon issue joined, found for him; but on the other issues the* plaintiff *obtained a verdict: Held, that the* plaintiff *was entitled to full costs upon all the* pleas.

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RULE to shew cause why the master should not review his taxation of costs, and allow the *defendant* his costs on the issue found for him. The *plaintiff* had declared in assumpsit; the *defendant* pleaded three pleas, First, the general issue; secondly, the statute of limitations; and thirdly, "as to 15l. 15s. being for so much of the said promises in the declaration as relate to advertising an estate to be sold; that the said promises in the declaration were made by the *defendant*'s testator, and one *John Hassels* jointly, and not by the *defendant*'s testator alone." The *plaintiff* joined issue on all the pleas. The jury found a verdict for the *plaintiff* on the plea of the general issue, and the plea of the statute of limitations; but at the same time found for the *defendant* on the third plea.

ESPINASSE, for the *plaintiff*, shewed cause in *Easter* term last, and cited *Norris* v. *Waldron*,* *Bridges* v. *Raymond*,† *Day* v. *Hanks*,‡ *Griffiths* v. *Davies*,§ *Butcher* v. *Green*,‖ and said that there was a distinction in all those cases. For there no issue, which went down to be tried

* 2 *Bl.* 1199.
† Ibid. 800.
‡ 3 Term Rep. 654.
§ 8 Term Rep. 466.
‖ *Doug.* 677.

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was found for the *plaintiff*; but, on the contrary, all that actually went down to be tried were found for the *defendant*. He cited also 23 *H.* VIII. c. 15; and 6 *Edward* I. c. 1. "If the *plaintiff* be nonsuited after appearance of the *defendant*, or any verdict pass against him, the *defendant* shall have his costs." He also cited Sir *John Astley*, Bart. v. *Young*.*

WIGLEY, *e contrà*, cited *Butcher* v. *Green*,† *Brooke* v. *Willet*,‡ *Dodd* v. *Joddrell*,§ and contended that the *defendant* was entitled to have his costs taxed upon the plea found for him.

Cur. adv. vult.

And now, in this term, the opinion of the court was delivered, in effect, as follows, by

Lord ELLENBOROUGH, C. J. After stating the case. "The question does not turn upon the stat. of 4 and 5 *Anne*, c. 16, for it is the same as if there was no double plea, and as if the *defendant* had pleaded, as to part, *non assumpsit*, and, as to the rest, had pleaded any plea in bar, for instance a plea of tender. In such a case, which is the common one, there is not any instance of costs being allowed to the *defendant*, if the issue upon *non assumpsit* is found against him. The statute of *Gloucester* 6 *Ed* I. c. 1. gives costs only to the *plaintiff* in an assize, &c. The stat. 23 *H.* VIII. c. 15, gives costs in tresspass, debt, or covenant upon any specialty, or contract, detinue, account, and *case*, to the *defendant*, if the *plaintiff* is nonsuited, or there be any verdict against him; and by the 4 *Jac.* I. c. 3, the *defendant* shall have costs where the *plaintiff* would have had them. Many cases have been quoted, both in this court and the court of common pleas, in which the courts would not tax

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* 2 *Burr.* 1232.

† *Ut supra.*

‡ 2 *H. Bl.* 435.

§ 2 Term Rep. 235.

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costs for the *defendant*. In *Bridges* v. *Raymond*,* it was held in the *common pleas* that if a *plaintiff* has a verdict on one count, costs shall be taxed for the whole declaration. But it is said that it is different in this court, and that here the costs will be given for the *plaintiff* only on those counts on which he obtains a verdict; and that where there are different counts and different issues on different pleas, some found for the *plaintiff* and some for the *defendant*, he shall be allowed the costs of those which are found for him. And by *Buller*, J. in *Butcher* v. *Green*, *Dougl.* 677, it is said *obiter* that where different issues are joined on different pleas, the *defendant* is allowed his costs on the issues found for him. But in *Buller's Nisi Prius*, p. 335, there is a note of a case where, in tresspass, the *defendant* pleaded three different justifications to three different counts, and, on issue joined, had a verdict for him on two, and against him on a third, and this was held not to be within the 4 and 5 *Anne*, c. 16. In Sir *John Astley* v. *Young*,† this court was unanimous that where the declaration consisted of two counts, and there was a joinder in demurrer, on the plea to one, and a plea to the other, and issue thereon, and a judgment for the *defendant* on the demurrer, and for the *plaintiff* on the issue, the *plaintiff* had a right to his costs upon that count on which there was a verdict, without any deduction on account of the *plaintiffs* having obtained judgment on the demurrer. And in *Butcher* v. *Green*,‡ it was held, that where there are issues joined on several counts, and on some a verdict is found for the *plaintiff*, and some for the *defendant*, the *defendant* shall not have costs on that part which is found for him. From these authorities the practice seems to be, that wherever the *plaintiff* succeeds, he shall have the whole costs; and whether the *defendant* has pleaded one plea to all the counts, or has pleaded separately, and succeeded in some,

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* 2 *Bl.* 1199.

† 2 *Burr.* 1232.

‡ *Doug.* 677.

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but the *plaintiff* has obtained a verdict on others, yet he has never been allowed costs as to that part which has been found for him; and it is the same on a demurrer. It is indeed difficult to make a distinction whether the issues are made separate by the *plaintiff*'s declaring on different counts, and the *defendant* pleading to each, or whether they are separated by the *defendant* in his pleas. A case was quoted for the *defendant*, in which he was allowed costs on several issues in trespass found for him; but in that case, there was no issue found for the *plaintiff*. This does not fall within the cases where there is in reality, no finding for the *plaintiff*, by reason of an admission of part of the *plaintiff*'s demand, and on that account only he obtains judgment; for here the *defendant* has not admitted any part of the *plaintiff*'s demand, but has put him to issue upon the whole."

RULE DISCHARGED.

The KING *versus* the INHABITANTS of CHIPPING NORTON.—*June* 6.

A pauper rented a tenement of 8*l.* 10*s. and also a* toll *for all cattle sold at the borough of* Chipping Norton, *which he took of the corporation of the said borough, at a court leet, by verbal agreement. Held, that the demise not being by deed, the pauper had not a good legal title to the toll, and so had not a tenement of* 10*l. per annum.*

The KING *versus* the Inhabitants of CHIPPING NORTON.

APPEAL to the quarter sessions for the county of *Oxford*, by the hamlet of *Overnorton*, in the said county, against an order of two justices for removing *Sarah*, the wife of *Wm. Townshend*, and her children from *Chipping Norton* to *Overnorton*.—"*Wm. Townshend*, the father, being legally settled in *Overnorton*, went about eight years ago to live at *Chipping Norton*, where he rented a house at 8l. 10s. per annum. The corporation of *Chipping Norton* are possessed of the fairs and markets within the

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borough, and of the toll for all cattle actually sold at the same. *Wm. Townshend*, at a *court leet*, took the said tolls by a verbal agreement, of the said corporation at 12l. per annum, and continued to collect them under the same agreement for two years, when it was *agreed* that he should have them for *ten guineas*, under which last agreement he continued to collect them for several years more. The court of quarter sessions held, that the said *Wm. Townshend* gained a settlement by renting more than 10l. a year, and discharged the order of removal."

Gibbs, Abbott, and Peckwell contended that this *toll* was a tenement; and that, together with the house in which the pauper resided, he had a tenement of more than 10l. per annum; and they cited the *King* v. *Piddletrenthide*,* *Co. Lit.* 28, a. the *King* v. *Skingle*, † 1 *Const*, 99, &c.

Macknaness, *contrà*, cited the *King* v. *Hammersmith*,‡ as a similar case, and objected also that the case stated only a verbal letting from the corporation, whereas a corporation could only demise by deed.

Lord Ellenborough, C. J. "Then the pauper is not a tenant, and has no tenement. The words of this case are, *he took the toll by a verbal agreement*; but if there was no deed, that is only a licence to settle there. He might, indeed, go into equity, to procure a lease, but at law he has no tenement, notwithstanding he might be liable to pay the poor rates, because he was at least an occupier."

Lawrence, J. "The words in the statute are, *shall come to settle on a tenement of* 10*l. a year*. I think the statute originally meant the residing in a house of 10l. a year."

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* 4 Term Rep. 772. † 1 *Str.* 100.

‡ 8 Term Rep. 450, n.

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LE BLANC, J. "We have long lost sight of the words of the statute."

Whereupon, it being suggested that there was a bond given by the pauper to the corporation, the court directed inquiry to be made whether any deed was executed. GIBBS said there was a bond given by the keeper of the toll-gate, which would clearly give a good equitable title; but he did not know that there was a good lease under seal, and it afterwards appearing that there was not such a lease,

THE ORDER OF SESSIONS WAS QUASHED.

FLEMING (qui tam) *versus* BAILIE.—*June* 11.

Three penalties of 20*l. each, amounting to* 60*l. for printing without the printer's name annexed, under* 39 Geo. III. *c.* 79, *s.* 26, *cannot be sued for in the superior courts, but must be recovered in a summary way before a justice, as directed in s.* 35, *as to penalties not exceeding* 20*l. The form of the declaration in that clause, though it sets out a penalty of* 20*l. by way of example, must be read as if it were in blank.*

FLEMING q. t. *versus* BAILIE.

THE PLAINTIFF declared on the stat. 39 *Geo.* III. c. 79, s. 26, "that the *defendant* is indebted to our lord the king in the sum of 60l. for that the said *defendant* after the expiration of forty days after the passing of a certain act of parliament, made and passed in the 39th year of his present majesty, entituled, &c. at, &c. did print a certain paper, which was intended to be published and dispersed, and one copy of which said paper was published, containing the words and figures following, [here the paper was set out] and did omit to print on the front of such paper, the same being printed on one side only, in legible characters, her name, and the name of the city and the name of the street in which her usual place of abode was, to wit, &c.; against the form

of the statute, whereby and by force of the said statute the said *Sarah* hath forfeited, for her said offence, the sum of 20*l.* one moiety thereof to our said lord the king, and the other moiety to the said *plaintiff*. 1804. FLEMING, q. t. versus BAILLIE.

LAWES, moved in arrest of judgment, that by the 35th clause of the same statute these penalties, being for 20*l.* each, could not be recovered in this court, but ought to have been sued for in a summary way before a justice of the peace.

BIRCH, *contrà*, shewed cause, and contended that this court could not be ousted of its jurisdiction except by express words or plain implication; that the 39th section of the act gives a form of declaration in the superior courts expressly for a 20*l.* penalty, and that the words of that clause are, that "*any pecuniary penalty, exceeding the sum of* 20*l. may be sued for by action of debt in any of his majesty's courts of record at Westminster*, in which action it shall be sufficient to declare or allege that the *defendant* is indebted to the *plaintiff* in the sum of 20*l.* (being the sum demanded by such action) being forfeited by an act made and passed, &c. [Here set forth the title of the act] and the *plaintiff*, if he shall recover in such action, shall have his full costs. And any pecuniary penalty not exceeding 20*l.* and for the recovery whereof no provision is herein before contained, shall and may be recovered before any justice of the peace, &c. in a summary way." He then cited *inter alia*, *Hawkins' Pleas of the Crown*, b. 2, c. 26, s. 30, and contended that the word *may*, not being imperative, and the form of action being set out with the sum to be recovered, which in this case was 60*l.* and above 20*l.* the whole effect of the clause was not to oust the court of its jurisdiction in this case.

Lord ELLENBOROUGH, C. J. "There are other penalties in the act of 100*l.* each and on this form, how would you

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declare for a penalty of 100l. if the form is to be considered as absolutely imperative, and not to be made sensible with the context? It must be considered the same as if it were in blank as to the sum; otherwise this absurdity would follow, that you must declare for 20l. in order to recover 100l. This is a new *species* of action in which the word *may* has a peculiar application; for, it impowers the *plaintiff* to sue, and the statute also describes where he is to sue; but the common informer has no right but what is given to him under the statute, and that says that he shall be entitled to sue in this court if the sum exceeds 20l. In this case it does not exceed 20l. It is true, there are three counts for 20l. each in one declaration; but three distinct penalties of 20l. are not the same as one penalty for 60l."

RULE ABSOLUTE TO REVERSE THE JUDGMENT.

The KING *versus* the INHABITANTS of DENBIGH.

June 13.

The stat. 13 Geo. III. c. 84, s. 56, which enacts that no person keeping a turnpike gate, renting tolls, and residing at the toll-house, shall thereby gain a settlement in such parish, does not prevent such person from gaining a settlement there by other means.

The KING *versus* the Inhabitants of DENBIGH.

APPEAL between the parish of *Henllan*, in the county of *Denbigh*, appellants, and the parish of *Denbigh*, respondents, against an order of removal of *Robert Hughes Gaynor*, his wife and children, from *Denbigh* to *Henllan*. The sessions confirmed the order, subject to a case, which stated in substance that the pauper was settled in *May*, 1802, in *Denbigh*, by residing there in a house, together with lands in *Henllan*, of the value of 26l.

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The KING versus the Inhabitants of DENBIGH.

per annum. On the 14th of *May*, 1802, he agreed with the toll-taker, in the parish of *Henllan*, to receive the tolls at the turnpike-house in *Henllan* as his servant at 3s. 6d. per week. A fortnight afterwards he took a field in the said parish of *Henllan* at 1*l*. per annum, and gave 6d. earnest. He continued in possession thereof two or three months, and resided with one child at the turnpike-gate house; but at the end of that time being unable to give security for the rent, he gave it up to the landlord. He took the field for hay and grass to keep his horse, but never reaped any benefit from it, as the grass was growing, and his mare was not turned in. He continued to reside at the turnpike for twelve months, afterwards receiving 4s. 6d. and latterly 5s. per week of the toll-taker. His wife and three children lived during the time at *Denbigh*, in a house of 3*l*. a year rent, but sometimes slept with him at the turnpike-gate. The gate belongs to the commissioners of the turnpike, but is set with the tolls. The court of quarter sessions held that the pauper had, *bona fide*, occupied lands of 10*l*. per annum in *Henllan* for above forty days and lived there as above stated; but reversed the order of removal, on the ground of the act 13 *Geo.* III. c. 84, s. 56, enacting "that no gate-keeper of any turnpike-road, or person renting the tolls thereof, and residing in any toll-house, shall be removable from such toll-house, &c. unless he shall become actually chargeable, &c. and no such gate-keeper or person renting such tolls, and residing in such toll-house as aforesaid, shall *thereby* gain a settlement in any parish or place whatsoever," &c.

Without argument, Lord ELLENBOROUGH, C. J "I am afraid the sessions had regard to some considerations with which they had nothing to do. Had they read the act of parliament rightly, they would have seen that it purports only, that a gate-keeper renting a toll-house shall not gain a settlement "*thereby*;" but it does

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not prevent him from gaining a settlement by any other means."

The order of sessions quashed, the pauper having a good settlement in *Henllan*.

The KING *versus* RICHARD HILL.—*June* 13.

On an appeal against the overseers' accounts, the appellant must, under stat. 41 Geo. III. *c.* 23, *state his objections specially to each* item, *and upon a notice of appeal, 'for that several sums are charged which ought not to be charged,' and then stating the items of the accounts, the quarter sessions ought not go into the question of how much ought to be charged on any* item. *Such a notice at most applies only to such charges as are wholly illegal.* Semble. *The notice should state specifically this article is illegal and ought not to be charged excessive, this was not paid and so on, as the case may be. Consent of counsel to wave the defect of notice should be at the quarter sessions, so that the court may have cognizance of it.*

The KING *versus* RICHARD HILL.

AT the general quarter sessions for the county of *Warwick*, *January* 11th, 43 *Geo.* III. the said court did in a certain appeal by *Richard Hill*, Esq. against the account of monies received and paid by the churchwarden and overseers of *Kineton*, and rated by them during the year from *Easter* 1801, to *Easter* 1802, order the first *item* or article in the notice of appeal to be allowed the said churchwardens in their accounts; and the second *item* to be disallowed, and struck out of the accounts; and further that the objections to the third and every other article in the notice could not be entered into, as the appellant had not stated in his notice the grounds or causes of the said appeal. The appeal was thereupon removed to the court of *King's Bench*, which court or-

dered that the said order of sessions, except so much as related to the said first and second *items*, should be quashed, and that the justice should enter continuances on the appeal. And afterwards, at the sessions on the 10th of *January*, 1804, upon hearing counsel, the court of quarter sessions was of opinion that they were, by reason of the stat. 41 *Geo.* III. c. 23, precluded from going into the 3d and 4th items in the said notice of appeal, by reason of the objection not being stated or specified in the said notice of appeal; and the said appellants' counsel having stated the objection to the fifth *item*, viz. "*two loads and one fourth of hulm for R. W.'s house*, 4*l.* 4*s.*" to be that the same had been charged before, that the charge was too high, and further that the house was not a house that belonged to the parish, the said court was of opinion that they could not enter into the same, because the said objections were not stated in the said notice. The court decided, in like manner, as to a number of other *items* or articles. As to the 45th item, viz. "paid *P. Roberts* half a year's interest of 12l. borrowed to pay the poor 6s." the objection was, that it is illegal to borrow money to pay the poor, when upon the face of the overseer's accounts, it appears that more money has been received than paid. The court refused to enter into it, for the reason aforesaid. The objection stated by the appellants' counsel to the 86th, 87th, 88th, and 89th items, viz. *Great Kingston, overseer's salary*, 1l. 11s. 6d.—*Little Kingston*, ditto, 1l. 1s.—*Writing levies*, 12s.—*Keeping books*, 5s. was, that the whole of the said charges were illegal. The said court, upon hearing counsel on both sides, ordered the same to be struck out and disallowed. To some *items* no objections were made. Some few items were therefore disallowed, on the ground of their being wholly illegal, and the rest, as far as I could collect from the record, were not allowed to be entered into, for the reason above stated of a defect in the notice.

READER and PARK, R. cited the stat. 41 *Geo.* III. c. 23, s. 24, and said that the quarter sessions refused to go into the case on account of a defect in the notice which

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was a mere transcript of the act of parliament, and did not point out any of the items against which the objections were made.

The court then called upon

CLARK, *N. G.* and MORRIS, *B.* "It was agreed in this court that the parties should consent to go into the *items*; but when we got back to the quarter sessions, the counsel there took an objection to the notice, and the quarter sessions refused to hear the residue of the *items*, notwithstanding the case was sent down for them to consider the residue of the matters of appeal. By a mere *mistake* of the other party the case was permitted to go off without argument, but we were entitled to have made our *rule* absolute, and, had we done so, we should have gone down to the quarter sessions to determine the matters of appeal. Still it went down for them to consider the residue of the *items*; and this case having been before this court, it is a disobedience of the order of this court to prevent us from going into those *items*.

Lord ELLENBOROUGH, C. J. "We ordered them to take into consideration the residue of the *items*, and they return that they have considered the case, and made orders upon every *item*. (The record upon the *certiorari* stated the objections to each item, where objections were taken, and that counsel were heard, and that the court refused to enter into the *items*, or decided upon them according to the fact.) We must take it that they have considered all that was directed to them. When they were ordered to consider the *items*, they were to do so with a due regard to the act of parliament. As to the consent of the counsel, here, that could not avail: the consent in the act of parliament must be taken to mean a consent at the quarter sessions, and not a consent out of their court, of which they could know nothing. We cannot say that the court of quarter sessions did wrong on the merits when they did right. We cannot compel them to proceed

contrary to an act of parliament. They cannot, therefore, be said to disobey any order of this court, for they were ordered to hear and determine the case, and they proceed to hear and determine it according to the statute-law, which they are bound to obey. Had it been that the case was heard in this court, and we had determined upon it, their proceedings would then have been a contempt of this court; but this passes *sub silentio* here, and they are directed to hear it, and exercise their judgment, which they have done. Is there any thing in the notice upon which you can rely as a good notice?"

LE BLANC, J. "The notice is in three lines, the rest is only a copy of the accounts. 'I intend to appeal at the next general quarter sessions against the receipt of the monies received and paid by the churchwardens, &c.' for that my objections are, that you have charged the inhabitants divers sums of money, with which the said inhabitants ought not to be charged, for that you have charged, &c. copying the accounts."

Lord ELLENBOROUGH, C. J. "I admit that if there are any of these *items*, which ought not to be charged at all, the notice is good as to them; but if the ground of the objection is, that too much has been charged, it must be stated so."

MORRIS, B. "They have stated some items of money paid to Mr. *A. B.* for assisting in making a poor's rate. This person is neither an overseer nor churchwarden. This *item*, therefore, cannot be good; for an overseer cannot charge for a deputy overseer."

Lord ELLENBOROUGH, C. J. "An overseer cannot be supposed to be himself possessed of all the information necessary to give him the means of making out the rate, and if it is necessary to employ persons to assist him in that respect, he may charge for it."

LAWRENCE, J. "Those acts which he must do

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personally, he cannot depute others to do for him, but there are other acts in which he may require assistance."

Lord ELLENBOROUGH, C. J. "If I was to make my objection, I should say such an *item* is illegal, or else it is excessive. And of another I might say that it has not been paid."

MORRIS, "This notice then does, in effect, state it to be illegal. It states that the inhabitants ought not to be charged with the *items* in the account."

LAWRENCE, J, "What notice does that give when you go into all other kinds of objections upon other items than those which are illegal."

RULE DISCHARGED, AND THE ORDER OF THE SESSIONS AFFIRMED.

The KING *versus* the INHABITANTS of WAKEFIELD.

June 13.

Evidence of the relief of a pauper's father and his family by the overseers of the poor of parish A. *forty years back, the pauper being thirty eight years of age, and such paupers, so relieved, being resident in another parish* B. *at the time, so as to negative their being relieved by the parish* A. *as casual poor, is evidence of the settlement of the pauper, notwithstanding the pauper was born at another parish.* Semble, *the place of birth is the slightest possible evidence of settlement; it is only evidence of the local residence of the mother at the time.*

The KING *versus* the Inhabitants of WAKEFIELD.

APPEAL upon an order of removal of *Mary*, the wife of *George Fielding* and her infant children from

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Alverthorpe, with *Thornes* in the west-riding of *Yorkshire*, to the township of *Wakefield*. The court of quarter sessions confirmed the order, subject to the following case. *Wakefield appellants; Alverthorpe, with Thornes, respondents.* "The respondents, in support of the order of removal, proved that the appellants had, at various times during forty years past, relieved *George Fielding*, the father of *George Fielding*, the husband of the pauper, *M. Fielding*, and different members of his family, some by being taken into the appellant's work-house, and some in other ways during the time that they resided in the township of *Stanley*, and had provided coffins for and defrayed the expences of the funerals of some of the family. It was also proved that *George Fielding*, who is now thirty-eight years old, the husband of the pauper, *Mary Fielding*, and father of the other paupers, was born and has always lived in the township of *Alverthorpe* with *Thornes*. The above was the only evidence given in support of or against the order of removal.

GIBBS and WOOD, in support of the order of sessions. "The question is, whether the evidence stated in the case is not admissible evidence, and at least some evidence, the degree of it being immaterial, that the paupers have a settlement in *Wakefield*. This is evidence against the appellants themselves. All the townships in the same parish support the poor of the separate township; there are three distinct townships, and it is impossible, that the township of *Wakefield* should relieve a pauper residing in another township, unless he was then belonging to their parish. They could not, in such a case, relieve him as one of the *casual* poor, as was suggested in the case of *the King* v. *Chadderton*."*

* 2 *East*, 27.

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Lord ELLENBOROUGH, C. J. "They relieved the pauper's father, and the different members of his, the pauper's father's family. Proof of the father's settlement is *prima facie* evidence of the pauper's settlement."

TOPPING, against the order of sessions. "In the case of the birth of a child, the evidence of the place of the birth is *prima facie* evidence of a settlement, where the father's settlement cannot be found, as in this case. But if the father's settlement can be found, the settlement of the child follows that of the father. *Rex* v. *Chadderton*,* is directly in point with this case, that evidence of relief is not evidence of settlement. *George Fielding* is 38 years of age; and, as it does not appear exactly what was the time of the first relief given to the father, it might have happened that he gained a settlement at *Wakefield* after the time when he might have *communicated* (imparted) such settlement to the child *(G. Fielding the younger)* by birth. So that it ought to have been proved also that the son had not gained a settlement elsewhere."

Lord ELLENBOROUGH, C. J. "In that case the evidence ought to come on your side."

LAWRENCE, J. "In the case, it is stated that the child was 38 years of age, but the father was relieved for forty years, which carries it back to a period before the birth of *George Fielding*, the son."

Lord ELLENBOROUGH, C. J. "Evidence of birth is only evidence that the mother was locally resident in the parish at the time. It is the slightest evidence possible of a settlement."

RULE DISCHARGED, AND THE ORDER OF SESSIONS AFFIRMED.

* 2 *East*. 27.

EDGCUMBE *versus* ROD and others.—*June* 7. 1804.

To trespass, for assault and false imprisonment, the defendants, *pleaded a commitment of the* plaintiff, *by them as justices, for want of sureties, until the next sessions, for a misdemeanor on the stat.* 1 W. *and* M. *c.* 18, *s.* 8, *which gives a penalty of* 50*l. to the crown; and before the sessions the prosecutor, with the consent of the* defendants, *agreed to the discharge of the* plaintiff; *and thereupon, at the sessions, he was discharged by the court, and accepted such discharge, in satisfaction of the assault and false imprisonment. Held bad on demurrer. For, the making up a prosecution, for a public misdemeanor, is illegal, and no satisfaction; and if there was any satisfaction, it moved from the prosecutor, and not from the* defendants.

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THE *plaintiff* declared in trespass for an assault and false imprisonment, to which the *defendants* pleaded not guilty; and also two pleas of justification or satisfaction, viz. first, "As to the assault and imprisonment, in the first and second count mentioned, and the assault in the third, that the same was and were made under and by virtue of a warrant under the hands and seals of the said *defendants, F. W.* and *C.* being three of his majesty's justices of the peace, &c. granted by them against the said *plaintiff* upon a certain complaint made to them, by *C. Marshal, clerk,* against the *plaintiff,* of a certain misdemeanor alleged to have been committed by the *plaintiff* against the statute 1 *W.* and *M.* c. 18, s. 18, whereupon the *plaintiff,* for default of sureties, was committed to the prison of *B.* to remain till the next quarter sessions. And afterwards, before the sessions, it was agreed between the *plaintiff* and *Charles Marshall,* with the consent of the *defendants,* that *Marshal* should not further prosecute the *plaintiff,* and should consent to his discharge at the sessions, in full satisfaction and discharge of the said assaulting, &c. And at the ensuing

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sessions, held at *L.* before *F. G. C. M.* (one of the *defendants*) and others *Marshal* did not further prosecute the said *plaintiff* for the said alleged offence, and then and there consented to the *plaintiff*'s discharge, and the said *plaintiff* was then and there discharged; and the said *plaintiff* then and there accepted the said *C. M.*'s not further prosecuting, and his consent to discharge the *plaintiff*, and his the *plaintiff*'s discharge thereupon in full satisfaction and discharge of the said assault and imprisonment; third plea, as before, as to the inducement or justification part of the plea, and that at the quarter sessions at *L. Marshal* did not further prosecute, but consented to the *plaintiff*'s discharge, and he was thereupon discharged by order of the same court, in full satisfaction and discharge of the several trespasses, in the introduction to the plea mentioned; which same premises the said *plaintiff* accepted, in full satisfaction and discharge of the said several trespasses. Issue joined on not guilty; demurrer to the second and third pleas, with causes, that it is not stated in the second plea what the misdemeanor was with which he was charged, nor whether the complaint was in writing, or upon the oath of *C. Marshal*, nor for what misdemeanor in particular the said *plaintiff* was committed."

BURROUGH, *for the plaintiff*. "The stat. 1 *W.* and *M.* c. 18, s. 18, upon which the *plaintiff* was first prosecuted, gives the whole penalty to the crown. The whole matter stated in the plea, is illegal, and therefore cannot amount to a good plea in satisfaction. There is besides no consideration for what is done, and nothing to go in satisfaction; for the necessary consequence of the prosecutor's not appearing at the sessions, would be to discharge the *defendant*, and the justices have no power to compromise, and the consent of the justices must be either illegal or nugatory. Neither they nor the prosecutor have any controul or discretion as to the case when it stands for trial. It sometimes happens, indeed,

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that this court, where there is an information, and the party has also brought an action, says that the action shall be put an end to, and a rule is formally drawn up for that purpose, but that practice proceeds entirely upon the ground that the court has a complete power and controul over the information, and may grant it or not at their discretion." He also argued that the second plea was bad, and it was admitted by the *defendants'* counsel that it stood upon the same footing as the rest.

DAMPIER, *contrà*. "On general principles there is nothing to prevent the parties from compromising a prosecution for a misdemeanor, although there are strong objections against it with respect to a felony.

[Lord ELLENBOROUGH, C. J. "Is it not illegal to give money to compromise a case of perjury?"*]

"In that case money was given to make up the matter, which is plainly illegal: and if there is any thing illegal in the manner of doing it, the plea of satisfaction must certainly be unsustainable. The main argument on the part of the *plaintiff* is, that the statute gives the whole penalty to the crown, and neither the party nor the magistrates can, for that reason, remit or compromise; but there is a fallacy in that argument, inasmuch as the penalty does not vest in the crown until conviction, and the compromise was previous to conviction. The plea states that he was committed for want of procuring these very sureties. The agreement is only, that this prosecutor should not further prosecute, and not that no prosecution whatever shall be had."

LAWRENCE, J. "Then the party has no benefit by the release."

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* 3 *P. W.* 277.

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"He at least avoids the inconvenience of the impending trial. A satisfaction may be pleaded, though the thing given may not be equal in value to the right relinquished; for *Cumber* v. *Wayne*,* which seems to the contrary, applies only to a satisfaction in money. In *Dyer*, 75, b. the party gave a small quantity of wax in satisfaction, and though it was not an hundredth part of the wax agreed for, yet the acceptance of it by the other party made it a good satisfaction. The court must, indeed, see that it is a reasonable satisfaction; but that can only mean that it must be a valuable or good consideration, not that the court is to weigh the satisfaction, so as to see that the party does not make an improvident bargain."

LAWRENCE, J. "What do the parties do by their accord if they have no power to accord? In that case there is no foundation for an accord, no ground for satisfaction at all."

"It is not necessary to an accord, that the consideration for it should move from the person by whom the *accord* is made; but *C. Marshal* might not have assented to the proposals of compromise, unless the justices had promised to give their consent, and then there is a consideration proceeding from the justices."

LE BLANC, J. "Suppose you had pleaded that he was discharged by the consent of the justices merely."

LAWRENCE, J. cited *Grynes* v. *Blofield*,† where it is said that satisfaction is no plea if it accrues from a stranger."

DAMPIER, "That case is cited in *Comyns's Digest*, *Accord*, A. (2,) and he adds to it, *per two justices*, as if he thought it doubtful. However, that objection does

* 1 *Strange*. 426. † *Cro. Eliz*. 541.

not apply to the first special plea; and it does not appear in that case, but that it was the mere *voluntary* interference of a stranger having nothing to do with the parties."

BURROUGH, in *reply*. "If instead of the party being discharged, the justices had witheld their consent, then no action for false imprisonment could have been maintained; for the justices would then have said they could not release the party, because they would have been liable to an action or indictment for granting their consent."

Lord ELLENBOROUGH, C. J. "One objection to this plea is, that the satisfaction pleaded is stated to proceed from a stranger, and in that case, upon the authorities, it seems generally understood to be no satisfaction. In addition to that, I think it is altogether illegal. It is nothing more than an agreement between *Marshal* and the magistrates to put an end to a prosecution for a penalty of 50l. under the toleration act, for disturbing a meeting; and the event of a trial is anticipated by his immediate discharge. The crown has a right to have the question gone into, to know whether the penalty attaches or not; and on the authority of *Collins* v. *Blantern*,* I think the agreement stated in the plea of satisfaction is wholly illegal."

GROSE, J. "The question is, whether that which is stated in the plea is a satisfaction; but I think it clearly cannot be so. By law the party ought not to be discharged until the quarter sessions; and at least, he ought not to be discharged without bail. If guilty, he ought to be put upon his trial, and meet the justice of his country; if not guilty, what benefit does the party derive from his being discharged. The justices, in that case, first commit a man improperly, and then discharge

* 2 *Wils.* 341.

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him, and call it a satisfaction for his imprisonment. They say, they will make up the matter: what is this but an illegal act in the one case; and, in the other, what is the satisfaction more than this, that they will abstain from adding injury to injury?"

LAWRENCE, J. "In *Comyns's Digest, Accord and Satisfaction*, A. (2,) it is said "it is no plea, if the satisfaction accrue from a stranger; by two justices, *Cro. Eliz.* 541.* He does not state it as if it was doubted at all, and Mr. *J. Popham*, who was one of the justices, was a very good lawyer. It is, therefore, quite unreasonable to doubt the authority of that case, and, if it is law, this plea is bad, because the satisfaction did not move from the justices."

LE BLANC, J. "I think the plea cannot be sustained, for the satisfaction, if any, moved from *Marshal*. This misdemeanor was not merely of a private nature, by an injury done to an individual, but of a public nature also. In that situation, if the *plaintiff* was rightly committed by the magistrates, they ought not to have taken any part in the making up of the prosecution. If they acted legally in the first instance, the law ought to have taken its course; if illegally, then they could not, justly, say that they gave the *plaintiff* any advantage by making up the prosecution.

JUDGMENT FOR THE PLAINTIFF ON THE DEMURRER

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* The case in *Croke* cites 36 *H.* VI. *Fitzherbert's* Abr. *Barre.* 166, 7 *H.* IV. pl. 31, and it appears that at the first moving of it, *Popham* and *Gawdy* held it to be no plea; for *J. S.* is a mere stranger, and in *no sort privy to the obligation*, and therefore, satisfaction given by him is not good; afterwards, in *Easter* term, by *Popham* and *Clench*, the other Judges being absent, it was adjudged for the *plaintiffs*. So that it was, in a manner, by three Judges, and was adjudged by the court.

YOUNIE *versus* MALLISON.—*June* 15. 1804.

Semble *to entitle the* defendant *to costs, under* 43 Geo. III. *c.* 46, *s.* 3, *where the* plaintiff *has arrested him for a larger sum than he recovers in the action, it must appear* clearly *that his intention was malicious, or at least vexatious.*

RULE to shew cause why the *defendant* should not be allowed the costs under the stat. 43 *Geo.* III. c. 46, s. 3. The *defendant* was arrested for 32l. 10s. At the trial before Lord ELLENBOROUGH, C. J. a verdict was obtained for 5l. 7s. 3d. The facts were as follows:—The *plaintiff* had furnished the *defendant* with ironmonger's goods, stoves, &c. The *defendant* quitted his house, and the *plaintiff* and *defendant* came to an agreement that the *plaintiff* should take back his goods again at their original cost. The *defendant*'s agent, one *Wright*, delivered the key of the house to the *plaintiff*, to take possession of the goods, and the *plaintiff* gave a receipt in discharge of all the demands on the *defendant* up to that time (17th of *July*, 1801;) but in order to enable the *plaintiff* to make the most of the goods, it was agreed they should remain in the house, to be taken by any tenant who might chuse to purchase them. The *defendant* afterwards gave up the possession of the house to the landlords, *Blake* and Co. and their agent obtained the key from the *plaintiff*, he expecting to have the selling of the stoves, &c. to a tenant; but they were afterwards detained by *Blake* and Co. who pretended that it was part of the agreement between the *defendant*'s agents, *Brandon* and *Wright* and *Blake* and Co. that the house should be given up with the stoves, &c. which were before given up to the *plaintiff*. On the trial, evidence was given of the sale of the goods, &c. but the *defendant* proved the above facts, and that *Blake* and Co. were apprized of the goods being given up to the *plaintiff*, and permitted them to re-

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main in the house, and nothing was said at the time of that agreement about giving up the goods with the house. Whereupon the jury gave a verdict only for the sum of 5l. 7s. 3d. for goods sold, after the 17th day of *July*, 1801, and not for any part of the above demand. In the affidavits for the *plaintiff*, on the motion, it was stated that he failed for want of proving the agency of one *Brandon*, together with one *Wright*, and that *Brandon* acted in giving up the goods to *Blake* and Co. But on the trial a letter was produced, written by *Wright* and *Brandon*, which *Wright* acknowledged, in which he had said that *Brandon* was appointed agent for the *defendant* with him, but said that he did not act. One *Northwood*, who was the person to whom the *plaintiff* delivered the key, was also a witness. He, in an affidavit against the rule, swore that *Brandon*, agent for the *defendant*, proposed to give up the house with the goods to *Blake* and Co. and to pay 84l. in order to be released by them from their agreement, and that he accompanied the *defendant* to the house, and he delivered possession of the house, stoves, &c. as a *boon*. The question upon the rule was resolved into this, whether the *plaintiff* had reasonable or probable cause for the arrest?

GARROW was heard in support of the rule; ERSKINE, *contrà*.

Lord ELLENBOROUGH, C. J. "It appears that the *plaintiff* was cognizant of the agreement to give up the house to *Blake*, and that *Blake* had the key given up to him for the mutual benefit of himself and the *plaintiff*. What is sworn now, upon the motion, by *Northwood*, the agent of *Blake*, would, if it had appeared upon the trial, probably have induced the jury to have given the *plaintiff* a verdict for the whole of his demand. But as the case stands now, I am by no means clear that he had a probable cause for the arrest."

GROSE, J. "At present I have a strong opinion in

favour of the *plaintiff*. We must be very cautious how we construe this act. It does not appear, from the fair construction of it, that a party is to be barred of judgment for his costs, in all cases where the verdict is for less than the arrest. He must pay costs only when his conduct is vexatious, and when he cannot think in his own mind that he had a reasonable and probable ground for the arrest; and I do not believe that this *plaintiff* intended to act vexatiously, but that he thought he had a probable cause of action, to the full amount."

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LAWRENCE, J. and LE BLANC, J. held, on the contrary, that the *plaintiff* had no cause to conceive that he had such right. "After a verdict on a trial, in which *Northwood* was a witness, his present affidavit should have been more distinct." As to the general point, LE BLANC, J. said "the court would not, after a verdict, weigh very nicely whether the *plaintiff* had a reasonable cause of arrest, but it must appear that his conduct was vexatious. Here, to rebut the charge of vexatious conduct, the *plaintiff* produces a witness, on whose evidence, if it had been the same at the trial, the *plaintiff* would have obtained a verdict, in that case he ought to speak very clearly as to the fact."

Lord ELLENBOROUGH, C. J. "In consequence of the doubts of the court, as to *Northwood's* affidavit, let the matter stand over for *Blake* and *Brandon* to make an affidavit as to whether *Brandon* saw *Northwood* in the month of *July*, 1801, and acted as agent for the *defendant*, and proposed to *Northwood* to deliver up the house with the stoves and bells; so, that it may appear whether or not it was a part of the original agreement with them that the *defendant* should give them up. It being stated in *Northwood's* affidavit that the *defendant* "resurrendered the house to *Northwood*, as agent for *Blake* and Co. *together with the stoves and bells*, expressly as a *boon*, and in consideration of being released from his agreement."

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In this term, affidavits were accordingly produced, but the counsel were not permitted to comment upon them. *Brandon* denied that he made any such agreement; but said a person called on him, who might be *Northwood*, that he referred him to *Wright*. "That *Blake* also called, whom he also referred to *Wright*; and *Wright* acted entirely in the business. He made no such agreement as to the stoves; the agreement was made with *Wright*, and be understood and *believed* the stoves were to be left for the benefit of the *plaintiff*." *Blake's* affidavit stated only that he understood from *Northwood* that *Brandon* had made the proposal stated by *Northwood*, and that he and his partners had lost 80*l*. a year's rent, by the house remaining vacant; which the *defendant* would have been liable to pay had not they relinquished his agreement.—No other affidavits were suffered to be read.

Lord ELLENBOROUGH, C. J. "There seems to be sufficient doubt about it to say that the action was brought with a probable cause. The rule must be discharged, but not with costs, for there was at least a probable ground for the motion."

M'CARTHY and Others *versus* ABEL.—*June* 19.

Certain ship-owners make an insurance on the ship, and also an insurance on the freight separately; the ship is detained by embargo; the owners abandon *the ship to the insurers thereon; the ship is afterwards released from the embargo, and returns home; freight is earned and in part paid to the underwriters on the ship, upon an indemnity: Held, that the owners of the ship cannot recover against the insurers on the freight; for there is either no loss at all, or no loss within the policy, since the loss of the freight, if any, arises from the act of the owners themselves.*

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in abandoning the ship to the insurers thereon. And so quàcunque viâ data the insurers on the freight are not liable.

THIS was an action on a policy of insurance on freight of the ship *Thomas*, upon a voyage at and from *Riga* to *Chatham*, *London*, *Portsmouth* or *Plymouth*. At the trial before Lord ELLENBOROUGH, C. J. at the sittings at *Guildhall*, after last *Trinity* term; a verdict was found for the *plaintiff* for 200l. subject to the opinion of this court on the following case:—The *plaintiffs* on the 19th day of *November*, 1800, effected the policy in question, which was underwritten by the *defendant* for 200l. at a premium of ten guineas per cent. and at the time of the loss occasioned by the embargo, in the declaration, and herein after mentioned, the *plaintiffs* were interested in the freight of the ship *Thomas*, in the voyage in the policy mentioned, beyond the amount of the insurance thereon. The *plaintiffs* being owners of the ship *Thomas*, chartered her on the 9th day of *September*, 1800, to Messrs. *Thorntons* and *Smalley*, of the city of *London*, merchants, to proceed from *London* to *Riga*, there to load, &c. [*Here the case stated the terms of the charter-party.*] The *Thomas* sailed in ballast from the port of *London*, in *September*, 1800, in pursuance of the said charter-party, and arrived at *Riga* in the *October* following. On her arrival there, she was supplied with a cargo, the whole of which had been delivered to the captain, and nearly the whole thereof, viz. 281 loads of masts, and 73 loads and 37 feet of other timber, had been actually taken on board, and the ship ordered to *Plymouth*, when on the 7th day of *November*, 1800, an embargo was laid by the *Russian* government on all *British* ships then in the port of *Riga*. Under that embargo, the *Thomas* was detained from the time just mentioned until the month of *May*, 1801, during which period the master and crew were kept as prisoners in *Russia*. Upon laying the embargo the ship was taken possession of by the *Russian* government, her sails were taken away, and the cargo relanded; the *plaintiffs* upon receiving intelligence of the detention of the ship,

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and the imprisonment of the master and crew, on the 11th day of *January*, 1801, abandoned their interest in the freight to the underwriters thereon, and demanded payment of a total loss on their respective subscriptions; and on the said 11th day of *January*, 1801, the *plaintiffs* abandoned the ship to the underwriters, by whom she had been insured. Upon the 30th day of *May*, 1801, the *Thomas* was restored by the *Russian* government, and the master and crew were released, and the cargo, which had been before shipped and afterwards relanded, as above stated, was again put on board, and the ship afterwards proceeded therewith for *Plymouth*, where she arrived in *August* following. The cargo was delivered to the agents of the freighters, and the freight earned by the ship in the said voyage amounted to 2242*l.* 6*s.* 10*d.* An indenture of three parts was made on the 26th day of *February*, 1801, between *Daniel M'Carthy*, *Robert Corner*, and *Lawrence Henderson*, *(the plaintiffs)* of the first part; *Henry Thompson* and *John Anderson* of the second part; and the several other persons, whose hands and seals are thereunto subscribed and set, of the third part; which, after reciting (in substance) that the said *H. Thompson* and *John Anderson*, and the said other persons, parties thereto, of the third part, had insured the said ship *Thomas*, upon her said voyage at and from *Riga*, to her port of discharge in *England*; that the said ship had been and then was detained under the said embargo at *Riga*; and that the *plaintiffs*, being the sole owners of the *Thomas*, had given, according to the law and usage of merchants, due notice of abandonment thereof, and had called upon the said several persons, who had underwritten the same, for the amount of their respective subscriptions, which the same several persons had respectively agreed to pay, on having the said ship assigned and transferred unto the said *Henry Thompson* and *John Anderson*, upon the trusts therein after mentioned, purports to be an assignment or transfer by the *plaintiffs* of the ship *Thomas*, and all the interest, property, claim, and demand of the *plaintiffs*, of, in, to, or

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out of the said ship, and her appurtenances to the said *Henry Thompson* and *John Anderson*, upon the trusts therein expressed; the said indenture is executed by the *plaintiff*, *Daniel M'Carthy*, by the said *Henry Thompson* and *John Anderson* and by the several other persons, parties thereto, of the third part; but not by the *plaintiffs*, *Robert Corner* and *Lawrence Anderson*, or either of them. In the month of *July*, 1801, the *plaintiff Robert Corner*, as the master of the ship, drew a bill at *Riga*, for 718l. 3s. 6d. upon Mr. *Halliday*, the agent of the underwriters on the ship, for the purpose of paying for masts, sales, cables, repairs, and other charges, on the ship; this bill was duly paid by Mr. *Halliday*; and on the 30th day of *September*, 1801, the said Captain *Corner*, as master of the ship, received at *Plymouth*, of the agents of the freighters, the sum of 500l. part of the freight, to enable him to pay seamen's wages and the charges of delivering the cargo, and the last mentioned sum of money was applied to those purposes. The underwriters of the ship claimed the freight; and the sum of 1742l. 6s. 10d., the balance of such freight, after deducting the said 500l. has been paid by the freighters of the ship to the agent for the said underwriters, under an indemnity from them against any claims which might be made thereto, either by the *plaintiffs* or by the underwriters on the said freight. The said agent, for the underwriters on the ship gave a receipt, dated the 7th day of *December*, 1801, for the said 1742l. 6s. 10d. as for freight of the said cargo.—*Question*—whether the *plaintiffs* were entitled to recover?

This case was ably argued in *Hilary* term by Hullock, for the *plaintiffs*, and Giles for the *defendants*; and in *Easter* term by Parke for the *plaintiffs*, and Erskine, for the *defendants*. These arguments embraced a variety of topics, but the grounds of the opinion of the court are so clear and decisive as to render it unnecessary to recapitulate them.

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19th of *June*.—The opinion of the court was this day delivered to the following effect, by

Lord ELLENBOROUGH, C. J. after stating the case, "The novelty of the question, the value of the property depending upon it, and the extent of the principles upon which it must turn, made the court desirous of obtaining every information upon the several points made in the case, and therefore, we wished for a second argument. Now, after considering the whole circumstances of the case, it resolves itself into this question, whether the freight has been lost or not? If, in fact, the freight, in this case, has not been lost, but has been fully received by the assured, then there is no loss within the meaning of the policy, and the insurers of the freight are not liable, because they made themselves answerable merely in case the freight should be lost. Thus it would be if the assured actually received the freight himself for his own use. but if it has been actually lost to the assured, in this case, it has not been lost by any of the risks in the policy, but only by means of the abandonment of the ship by the assured himself, which is his own voluntary act, and with which the insurer on the freight has nothing to do. The *plaintiffs* are, therefore, not entitled to recover, *quâcunque viâ datâ*, whether the underwriter on the ship is entitled to receive the freight or not."

NONSUIT TO BE ENTERED.

GOULD *versus* GAPPER, *Clerk*.—*June* 7.

The defendant *libelled the* plaintiff *for tythes in the spiritual court; the* plaintiff *pleaded that the place was extra-parochial; the* defendant *replied an inclosure act* 31 Geo. III. c. 91, *and insisted that it was thereby annexed to and made part of the parish whereof he was rector; the spiritual court decreed, accordingly, the tythes to be paid to the* defendant: *Held,*

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upon a declaration in prohibition, that the spiritual court, having misconstrued the statute, a prohibition might be granted in this case after sentence; it appearing that the court could no otherwise have decreed the tythes than by misconstruction of the statute.—Note, *The question suggested by* Buller, J. *in* Home *v.* Camden, 4 T. R. 382. 2 H. Bl. 533, *whether the misconstruction of a statute is not matter of appeal and not of prohibition, after sentence, is now settled that it is matter of prohibition.*

THE *plaintiff* declared in prohibition against the *defendant* for prosecuting a plea in court Christian, in substance as follows: for that whereas, "the trial of bounds, borders, and limits of parishes within the realm of *England,* and how such bounds, borders, and limits do extend themselves, and all and singular pleas and business of and concerning the same, and of and concerning all prescriptions and customs whatsoever within this realm and the cognizance of those pleas, are and from time, &c. have been matters merely triable by the common law of *England,* and not in any manner by ecclesiastical courts and censures." "And whereas, in 1799, and the two following years, and in *January,* 1800, the *plaintiff* occupied meadow and pasture and divers other land, late parcel of *King's Sedgmoor,* in the county of *Somerset,* which, by an act made in the 31st year of King *Geo.* III. intituled an act for draining and dividing a certain moor or tract of waste land, called *King Sedgmoor,* in the county of *Somerset,* hath been lately drained, inclosed, allotted, &c. and which said meadow, &c. so occupied by the *plaintiff,* until the allotting &c. of the said moor, whereof, &c. were not, nor was any part thereof, within the parish of *High Ham,* in the county of *Somerset,* or the tytheable places thereof, nor within the bounds or tytheable places of any parish whatsoever, but wholly *extra-parochial;* and whereas in the said act there is a saving to the king's most excellent majesty, and his heirs, of all such right, &c. as his said majesty had before the passing

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of that act.—And whereas within the parish of *High Ham* aforesaid, and the tytheable places thereof, there now are, and from time &c. have been certain customs, &c. (setting out a *modus* for meadow lands, for *milch cows*, and for agistment respectively), yet the *defendant*, rector of the parish of *High Ham*, meaning to aggrieve the *plaintiff*, &c. in the consistorial court of the archdeacon of *Wells*, exhibited his libel against him, alleging *inter alia* that in 1797, and the two following years, and the month of *January* aforesaid, he was rector of *High Ham*, that the said meadow and pasture lands, and other lands were mowed, and that the *plaintiff* received hay therefrom, and depastured *unprofitable* cows thereon, and tilled other parts; and *whereas* the *plaintiff* alleged and offered to prove the matters aforesaid; and the *defendant*, by way of answer, "did deny that the said parcel of land, &c. were extra-parochial, for, the proprietors of land in the several parishes thereto near adjoining of which he alleged the said parish of *High Ham* to be one, did, in respect of their lands, &c. claim, and from time whereof, &c. had claimed right of common of pasture on the said moor, and therefore he submitted that the said tract of pasture land lay in and was part of the said parishes, though the respective boundaries were not known; that it was not in the said act mentioned to be extra-parochial, but to be in, near, or adjoining to certain parishes; that the commissioners therein named did set out and allot the same tract to and among each and every of the said parishes, and did allot part of the said tract adjoining to the old inclosures of the parish of *High Ham*, unto and for the said parish, and other part to *Low Ham*; and that by another act of the 37 *Geo.* III. intituled an act for dividing, allotting, and inclosing the open or commonable lands and fields within the parish of *High Ham*, in the county of *Somerset*, &c. the said parcels of meadow land, in the occupation of the *plaintiff*, were allotted under and by virtue of the said act for or in respect of some or one of the rights of common, appurtenant to some or one of the said tenements, in the said parish of *High*

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Ham and *Low Ham*, and, there, were parcels of the said allotments made under the said first act, and that the same were within the bounds or limits of the said parish of *High Ham*, and that in the said act, secondly above mentioned, it was enacted "that all and singular the lands, which should be allotted under and by virtue thereof, should be held under and subject to the same charges, tenures, customs, suits, services, and incumbrances as the several tenements in respect whereof such allotted lands should be respectively made or taken, would have been liable to be charged with or effected by in case that act had not been made;" and that under and by force of the statute 2d and 3d *Edw.* VI. the rector of *High Ham* was entitled to the tythes of the increase of cattle of the inhabitants and parishioners of *High Ham* aforesaid, &c and denied the *moduses*, &c. Yet the said *plaintiff* says, that notwithstanding the matters herein before alleged, the said *defendant* hath caused the said *plaintiff* to be convicted of the premises, and he hath been condemned in the said spiritual court, in a large sum of money, in lieu and satisfaction of the said tythes alleged to be substracted &c.*

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* The private act 31 *Geo.* III. referred to in this case, was, as to the material clauses, as follows: It recited, *inter alia*, that the rights of common would be rendered more valuable if the same were divided and inclosed into certain parochial or other large allotments; section 22 enacted that the commissioners, "after the same shall be drained, shall allot, set out, and divide the same unto and amongst each and every of the several parishes or hamlets of *Somerton*, &c. *High Ham*, *Low Ham*, &c. and also to and amongst such other parishes and hamlets as shall appear to be entitled thereto respectively, which said allotments shall be proportionable to the rights of common to be sued, taken, or enjoyed therein, and shall for ever after be deemed and taken to be part and parcel of the several parishes or hamlets to which the same respectively shall be assigned by the said commissioners

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This case came originally before the court on a motion for a prohibition;* when in order to have the matter fully decided as to the power of the temporal courts to grant prohibition against the spiritual court after sentence in a matter originally within their jurisdiction, but in which they had decided contrary to the common law upon matter of a temporal nature incidentally arising, the court ordered a declaration in prohibition, and the case was very fully and ably argued in *Easter* term by DAMPIER, for the *defendant;* and BURROUGH, for the *plaintiff*. The topics chiefly insisted upon were the same as in the former argument, and a great variety of cases were cited; but the judgment of the court went so thoroughly into the whole case that it is not necessary to repeat them.

Curia. adv. vult.

On this day the judgment of the court was delivered to the following effect, by

Lord ELLENBOROUGH, C. J. After stating the case;

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and the owners of common rights within each respective parish and hamlet, allowed by virtue of this act, shall have and enjoy the same right of common and other right whatsoever, in the respective share allotted to such respective parishes and hamlets as they now have and enjoy over the whole of the moor," &c. Section 22 provided that the several villages or hamlets of *D.S. M. B. S. Low Ham*, and *Edington*, on account of the size and extent thereof, and the number of messuages, having right of common in the said moor, lying within the same villages or hamlets respectively, shall be deemed and taken to be parishes within the meaning of this act. Section 44. "Saving to his majesty, his heirs and successors, and *all and every other person and persons*, bodies politic and corporate, their heirs and successors, all such right as they or any of them had before the passing of this act, other than and except the several lords of the manors and owners of common rights within the several parishes and hamlets to which any allotments shall be made, and whose rights of common, or the whole of such moor, are intended to be barred or extinguished," &c.

Vide *Gapper* v. *Gould*, 1 *Law Journal*, p. 305.

"Objection has been made to the granting of this prohibition, that it comes too late, after sentence, and that the ground upon which it is applied for is now matter of appeal and not of prohibition: that if the defect of jurisdiction does not appear upon the face of the libel, it is too late to apply for prohibition after sentence; that it does not appear, from the proceedings that the court below did proceed upon the act of parliament, and that, on the contrary, it might have proceeded in fact upon some other ground, as upon the statute 2d and 3d *Edw.* VI. In support of these positions, several authorities have been cited and relied on by the counsel for the *defendant*; 2 Rol. Abr. 209, pl. 2 *Argyle* v. *Hunt*, 1 *Strange*, 197; *The Churchwardens of Market Bosworth* v. *the Rector of Market Bosworth*, 1 *Ld. Raym.* 435, and *Full* v. *Hutchins, clerk*, Cowp. 422. As to this latter objection, it is clear that the ecclesiastical court could not have proceeded on any other ground than the enclosure act, because, in the proceedings the *plaintiff* below no otherwise denied the allegation of the *defendant* below, that the lands were extra-parochial, than by alleging that the *defendant* occupied lands near to, and for which he claimed common on the said moor, and had an allotment thereof; and also by stating the statutes 31 *Geo.* III. c. 91, and 37 *Geo.* III. and alleging that by the effect of those statutes the land so allotted was annexed to the parish of *High Ham*. So that it is certain that the ecclesiastical court had no ground upon which to exercise their jurisdiction but those two acts of parliament and the construction of the same. As to the objection that the authorities do not warrant a prohibition unless the defect appears on the face of the libel, even in the case of *Full* v. *Hutchins*, a distinction is taken where the temporal matter comes incidentally in question, and the ecclesiastical court proceeds according to other principles than the temporal courts: and as an instance, Lord MANSFIELD mentions the construction of acts of parliament, and says "they shall not be prohibited unless they proceed to determine contrary to the principles of the common law." It must

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be observed indeed, that in such cases no prohibition can go until after sentence, and in *Shotter* v. *Friend*, *Salkeld*, 547, the same distinction was taken, that where the court has jurisdiction of the original matter and an incident happens, which is of temporal conusance, they shall try the incident; but they must try it as the common law would; and it was held in that case that it was not too late to come for a prohibition after sentence, for, the sentence is the grievance. The next point is, whether the statute has been misconstrued or not. But as to the actual misconstruction of it, the counsel for the *defendant* in prohibition did not argue that the effect of the allotment was to make the land a part of the parish of *High Ham*. If this was the first time that the question had occurred, it might perhaps be deemed matter of appeal rather than prohibition, according to the opinion of Mr. Justice *Buller*.* But from very early times down to an authority recognized by the House of Lords, namely, the case of *Brymer* v. *Atkins*,† it appears that "misconstruction of law is a ground for prohibition," and we cannot hold ourselves warranted in an opinion that the grounds of prohibition are so narrow as to be confined only to that which appears upon the face of the libel. Mr. Justice *Blackstone*, in his Commentaries, in stating the cases in which prohibition must go, b. iii. c. 7, s. 112, says, "if in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them, as where they require two witnesses to prove the payment of a legacy, a release of tythes, or the like, in such cases a prohibition will be awarded. For, as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided by those courts, because incident or accessary to some original question clearly within their jurisdiction, it ought, therefore, where the two laws differ, to be decided not

* *Home* v. *Camden*, 4 Term Rep. 382.

† 1 *H. Bl.* 164.

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according to the spiritual but according to the temporal law." This seems to me the fair result drawn from the authority of the cases. And that such are the principles upon which prohibitions may be granted has been held by very considerable judges, as in 2 *Rol. Abr.* 340, pl. 11.—2 *Levinz*, 209. So in *Com. Dig.* prohibition, G. 23, and D. " a prohibition lies after sentence, if the libel be for a thing within their jurisdiction, and a temporal matter becomes incident, and they refuse such proof as the temporal courts allow, as proof by a single witness." In *Sir W. Juxon* v. *Lord Byron*, 2 *Levinz*, 64, Lord *Hale* and the whole court agreed that the ecclesiastical court, though they may try matters at common law which fall in incidentally where the principle is ecclesiastical, yet they shall be prohibited if they proceed in the trial of such incident temporal matter otherwise than the common law would. And in *Shotter* v. *Friend*, according to the report in *Carthew*, 143, " it was allowed that regularly where the spiritual court hath cognizance of the principal, they shall have cognizance of the incidents and accessaries; but if the incident is matter merely temporal, they must proceed there according to the course of the common law, and not *secundum jus ecclesiasticum*. In the *articuli cleri*, 2 *Ja.* I.* exhibited under the authority of *Bancroft*, archbishop of *Canterbury*, there is one article that " *no temporal judges, under colour of authority to interpret statutes, ought, in favour of their prohibitions, to make causes ecclesiastical to be of temporal cognizance.*" To which the answer was, that " for the judges expounding of statutes that concern the ecclesiastical government or proceedings, it belongeth unto the temporal judges." So *Wheeler's* case, in *Godbolt*, 218, was a question upon a statute within the jurisdiction of the ecclesiastical court. On this case Mr. Justice *Buller* says, in *Home* v. *Lord Camden*, that it seems to have been decided on the ground that the ecclesiastical court had no jurisdiction in that

* 2 Inst. 614.

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case. But it seems rather that the ground was that the ecclesiastical court had held that to be a breach of the statute which the courts of common law would not have held to be so. So also in *Roll's Abr.* 303, pl. 27, the book can only be understood of a prohibition after sentence, and even after an appeal to the delegates, where there was a judgment given upon the construction of a statute contrary to the common law; and the next case which follows in the same book, pl. 28, *H.* 22, *Ja. B. R.* [of administration intended to be granted, on appeal, to the son of a *bastard*, who claims to be next of kin of the whole blood, but cannot be so by our law] establishes the same doctrine as to the manner in which the ecclesiastical court must decide upon matters of common law. In *Berkely* v. *Morrice, Hardres*, 502, where the *defendant* pleaded the statute of limitations to a suit in the admiralty court, the court held "that the admiralty court ought to have received the plea; and if it were not received, the rejecting of it was a good cause to have prohibition; as likewise if they receive it, and do not give sentence thereupon, as the common law requires. But a prohibition lies not before refusal, because the original matter is examinable. The counsel on the other side urged that the reason of the suit being so long delayed was on account of the absence of the *plaintiff* below; but the court held that was not material, for the statute provides for the absence of the *defendant* below, only." In Sir *T. Raymond*, 496, *Carter* v. *Crawley*, it is said, "whatever is determined by the common law to be the true meaning of the act must be a rule to the ecclesiastical courts; for the courts of common law are entrusted with the exposition of the acts of parliament, and we ought not to suffer them to proceed in any other manner than shall be adjudged to be the true meaning of this act." In the report of the same case, in *Freeman*, 296, 297, 298, it seems there was a difference between the judges in this case; but that difference did not proceed upon the ground for which the case was quoted, but upon what was to be the true construction of the statute. The case of *Pierce* v. *Hopper*, 1 *Strange*,

249, proceeded not only upon the ground of a want of jurisdiction in the inferior court, as was stated by Mr. Justice *Buller*, but also upon a misconstruction of the statute in that case. For, *Pratt*, C. J. says, "The question is, whether the *plaintiff* has incurred the penalty of the statute; for if he has, the jurisdiction of the court of admiralty of the *Cinque Ports* is not to be doubted;" and again he concludes, "But even admitting it to be within the intent of the act, yet surely in the case of freehold we ought to be satisfied of the justice of that removal (of the *plaintiff*) by their (the *defendants'*) shewing a power to make bye-laws and every other step necessary to make a lawful removal; *and for want of this, as well as for want of jurisdiction of the cause*, I think no consultation ought to go." All these cases are clearly within the jurisdiction of the several courts below. Some of them are cases where the courts of common law have taken upon themselves the construction of acts of parliament peculiarly applicable to the jurisdiction of the courts below; and the distinction which was laid down by the counsel for the *defendant* by no means applies to them: for the prohibitions in those cases were granted not merely, as was contended by him, where the rules of the two jurisdictions must necessarily clash, as in the case of prescriptions and the not allowing of proof of a fact by one witness only; but it appears that in all cases, in which matters of a temporal nature occurred incidentally, it was held a sufficient ground for granting a prohibition against the several inferior courts when such courts had decided contrary to the rules of the common law. And not only in the case, decided by Lord *Hale*, of Sir *Wm. Juxon* v. *Lord Byron*, but also in *Full* v. *Hutchins*, the same principle was recognized. To use, as applicable to this subject, the words of *Vaughan*, J. whose authority has been quoted: "If the granting of prohibition to the spiritual courts in this case were *res integra* now, we might not see reason to grant them; yet, after prohibitions have been so granted for several ages, we cannot be expected to alter the law as it appears to

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stand at present. For these reasons we are of opinion that the prohibition must go.

PROHIBITION GRANTED.

REX *versus* CORRY.—*June* 15.

Indictment on statute 11 Geo. I. *c.* 4, *s.* 6, *against a bailiff of a corporation, for not attending at the election of a new bailiff: Held, that as he was not one of the electors of the new bailiff, under the charter, his absence could not impede or hinder the election, and he therefore was not within the statute. The statute does not make the attendance of the mayor, bailiff, or chief officer, necessary, where it is not so by the charter.*

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THE *defendant* having been convicted at the last assizes for the county of *Somerset*, upon an indictment on the statute 11 *Geo.* I. c. 4, s. 6, for not attending as bailiff at the election of a bailiff for *Ilchester*; BURROUGH, in last *Easter* term, moved for the *defendant* in arrest of judgment. The indictment stated "that, by letters patent, 11th *December*, 3 and 4 *Philip* and *Mary*, it was granted that the borough of *Ilchester* should be a borough corporate of one bailiff and burgesses, for ever, &c. by the name of the bailiff and burgesses of the borough of *Ilchester*; that there should be one bailiff to be chosen and instituted of the burgesses of the same borough; that *John Phillips* should be the first bailiff, from thence to *Michaelmas* then next, and thence until another inhabitant or burgess should be made ruler, and sworn according to the charter, if the said *J. P.* should so long live; that there should be twelve men of the best and most discreet burgesses of the same borough, that should be called the chief burgesses and counsellors of the same

town, for all things, &c. touching the said borough, and the good *regimen*, state, and government of the same, and that they the chief twelve burgesses and counsellors should be from time to time aiding and assisting the bailiff, for the time being, in all causes, &c. touching the said borough. And that the said capital burgesses, for the time being, or the greater part of them, from time to time, might yearly, on *Monday* next before *Michaelmas* day, chuse and nominate one of themselves to be bailiff for one whole year then next ensuing. That the said *James Corry*, on the 25th of *September*, 43 *Geo.* III. and afterwards, &c. was bailiff; that on the *Monday* after *Michaelmas* day, 43 *Geo.* III. certain of the then capital burgesses and counsellors of the said borough assembled and met together at the *Guildhall* of and within the borough aforesaid, the same being the usual and proper place for that purpose, in order to chuse and nominate one of themselves to be bailiff of the borough aforesaid, for one whole year; and it was then and there the duty of the said *James Corry*, as such bailiff as aforesaid, to attend and be present at such election: nevertheless, the said *J. C.* not regarding his duty in that behalf, nor the statute in that case made, upon the said *Monday* next before the feast of *St. Michael*, &c. the same being the day appointed by the said charter for such election as aforesaid, unlawfully and voluntarily, did absent himself from the said assembly, so holden &c. against the form of the statute," &c. A second count stated, " that from the time of the letters patent, there hath been and still is a custom, that the bailiff of the said borough, for the time being, should and ought to attend and be present on the *Monday*, &c. at a meeting, &c. in order that the burgesses should elect, &c. The third and last count stated that he did, on, &c. at the parish of *Ilchester*, with force and arms, knowingly and designedly, prevent and hinder the election of a bailiff, &c. The *defendant* was convicted on the first count—*(Sed quære.)*—To this indictment, therefore, he took the following objections: first, that there was no *vill* or *venue* stated

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where the offence was committed; secondly, that it was not averred that the *defendant* was a chief officer; (this was abandoned); and, thirdly, that it was not stated that the attendance of the *defendant* was necessary for the purpose of the election.

A rule to shew cause having been obtained,

GIBBS, LENS, Serj. and PELL, shewed cause. "The *defendant* was an officer within the meaning of the act of parliament, and bound to attend. For the words of the act are, 'If any mayor, bailiff, bailiffs, or other chief officer or officers of any city, borough, or town corporate, shall voluntarily absent himself or themselves from, or knowingly or designedly prevent or hinder the election of any other mayor, bailiff, or other chief officer, in the same city, borough, or town corporate, upon the day or within the time appointed by charter or ancient usage for such election, the person or persons so offending, being thereof lawfully convicted, shall, for every such offence, suffer imprisonment for the space of six months, without bail or mainprize, and shall be for ever disabled to take, hold, or exercise any office belonging to the said city, borough, or corporation.' The attendance of the *defendant* was necessary, in this case, at the election. For, although he may not be one of the electors, yet he is the head of the corporation, and his presence is necessary to give effect to the meeting. The capital burgesses are to elect, and he, though bailiff, is also a capital burgess. It is true, there is no *quorum* clause in this charter, that the bailiff shall be one of the electors, or one present at the meeting, but the *quorum* clause is no more than the law would imply without it. And the bailiff being the head of the corporation, nothing can be done without his presence; and this is so, though no special provision is made for it by the charter. *Regina* v. *the Bailiffs, &c. of Ipswich.** Granting that a good meeting might be

* 2 *Lord Raymond*, 1237.

had without the bailiff, merely for the purpose of election; yet, as chief officer, he has certain other duties to perform, in respect of which he ought to attend. And the act does not proceed upon any supposition that the attendance of the mayor or chief officer is necessary, in order to make a good meeting: it rather supposes that his presence may not be necessary; for it is in the alternative, if he shall voluntarily absent himself, or knowingly or designedly prevent and hinder an election. If his presence were necessary to make a good meeting, then his absence would always hinder the election, and the first clause would be superfluous.* The act, therefore, either presumes that his attendance is necessary in all cases, or it creates a necessity in all cases, though by the charter it should not be necessary to the validity of the election. If the *defendant* had good cause of absence, he must shew such cause as an excuse on his part, and if that were a defence, he must shew that his presence was not necessary." They cited 10 Mod. 75; and also *Eliz. Dormer*'s case,† to shew that it was not necessary to allege that the *defendant* had no reasonable cause of absence. As to the *venue*, they said, it was not necessary to lay a venue to a negative allegation.

BURROUGH, *contrà*. "A *venue* must be laid in a certain place, in a certain vill; but here are several places mentioned and not one of them laid as a vill. The words, *then and there met together*, refer to 'the *Guildhall* of and within the borough aforesaid,' but that is no venue. An indictment, laying the offence at the *Guildhall* of *London*,

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* The first clause of the statute provides that the mayor, &c. who ought to hold and preside at the meeting, being absent, the nearest in place to him may hold the court. The argument must, therefore, be understood of an attendance of the mayor, &c. as an elector required by the charter, and not remedied by this clause.

† 2 *Leonard*, p. 5.

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has been held bad at the *Old Bailey*." He then cited Lord *Hale*'s Pleas of the Crown, c. 25, s. 23. as to the venue in *barratry*, which by some has been held not necessary, but in *Easter*, 23 *Car.* II. in *Lamb*'s case, the indictment was quashed for want of a venue, and the former case, which held it unnecessary, was overruled; and in *Tremain*'s Pleas of the Crown, a venue is alleged in all the cases of *barratry*. Secondly, "The indictment should state that the attendance of the *defendant* was necessary for the purpose of the election, and whether it became so by charter or prescription. Under this charter it is not necessary that he should attend at the election. The election is given to the capital burgesses *eo nomine*; but during the year that the bailiff is in office, he is pointed out as a separate body. He is directed to be aiding and assisting to the *capital burgesses*; he cannot, therefore, be considered as a part of them during that year; for the charter would scarcely direct him to be aiding and assisting to himself. His presence at the meeting could be of no service, and his absence was of no hindrance to the election. The fair construction of the act is, that if a chief officer of a corporation is *voluntarily* absent from the meeting when his presence is necessary, he offends against the first branch of this section; and if he is present and does any thing which may break up the meeting or hinder the election, he offends against the latter branch of it. But the argument for the crown proceeds upon the supposition that the word *voluntary* is not material in the statute, and may be omitted in the indictment, and also that the statute makes the attendance of the chief officer necessary where it was not before. The preamble, however, shews that the legislature had in view only such an absence as might be prejudicial to the corporation, and a hindrance of the election, or a dissolution of the corporation for want of it."

LAWRENCE, J. "You construe the act as if it were to be read 'being absent or *otherwise* preventing the election."

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Lord ELLENBOROUGH, C. J. "Suppose the charter were to require the new elected mayor or bailiff to be present, and the mayor or bailiff, being present himself, were yet to procure the new-elected mayor or bailiff to be absent; he might then defeat the election, and in your view of the case, would fall under the second branch of this section."

On the next day (*June* 15th,)

Lord ELLENBOROUGH, C. J. delivered the judgment of the court to the effect following: "The attendance of the *defendant* was not required by the charter. His attendance was not necessary; his absence could neither defeat nor impede the election: unless therefore the act of parliament itself rendered it absolutely necessary for him to attend, he could not be considered as offending against it." The court decided upon this ground shortly, which made it unnecessary to consider the other objections which had been made to the indictment.

JUDGMENT FOR THE DEFENDANT.

DOWLAND *versus* SLADE.—*June* 7.

Semble, *If a demandant, in a* writ of right, *count upon the seisin of his ancestor* in his demesne as of fee, *omitting* and of right, *it is bad: Held, on error, both by the court of* Common Pleas *and this court, that if the demandant, in deducing his title through a female, describes her as* sister and heir *of* T. G. *and it appears upon the face of the count, that* T. G. *left a son* W. G. *who survived his aunt, it is fatal, because she could not be* heir *of* T. G. *although it also appears, that upon failure of issue of* W. G. *the issue of the sister of* T. G. *became his heirs.*

DOWLAND versus SLADE.

A WRIT of *right close* was prosecuted in the court of the *manor* and forest of the manor of *Gillingham*, in

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Dorsetshire, and the court founded thereon was as follows: "*Thomas Dowland*, by *Augustin John Mayhew*, his attorney, demands against *William Slade* and *Elizabeth his wife*, 18 acres of land, &c. and within the jurisdiction of this court; and whereof he says that *Thomas Gamlyn was seised in his demesne, as of fee*, according to the custom of the manor aforesaid, in the time of peace, in the time of *George* the Second, late King of *Great Britain*, &c. and within sixty years, now last past, by taking the esplees thereof to the value, &c. and died thereof seised, leaving one *Elizabeth*, his wife, him surviving, and from the said *Thomas Gamlyn*, the right to the said tenements, with the appurtenances, descended and came to *one William Gamlyn*, as brother and heir to the said *Thomas Gamlyn*, subject to the estate of free-bench of the said *Elizabeth*, therein according to the custom of the manor aforesaid, and from the same *William Gamlyn*, the right to the said tenements with the appurtenances, subject to the said estate of the said *Elizabeth Gamlyn*, descended and came to one *Hannah Dowland*, as eldest cousin and heir of the said *William Gamlyn*, according to the custom of the said manor, that is to say, as eldest daughter and heir of *Hannah Ball*, who was the only sister and heir of one other *Thomas Gamlyn*, who was the father as well of the said first mentioned *Thomas Gamlyn* as of the said *William Gamlyn*, which said *Elizabeth Gamlyn* died in the life-time of the said *Hannah Dowland*; and from the said *Hannah Dowland*, the right to the said tenements, with the appurtenances, descended and came to one *Thomas Dowland*, as son and heir of the said *Hannah Dowland*, and from the said *Thomas Dowland*, the son and heir of the said *Hannah Dowland*, the right to the said tenements, with the appurtenances, descended and came to the said *Thomas Dowland*, the now demandant, as son and heir of the said *Thomas Dowland*, the son and heir of the said *Hannah Dowland*, and that this is his right; he the said *Thomas Dowland*, the now demandant offers, &c. To this *writ of right* in the manor court, there was a *general demurrer*, and finally, judgment for

the *demandant*. The *tenant* thereupon brought a writ of *false judgment* in the court of *Common Pleas*, where the *judgment* was reversed, on the ground of an informality in stating the descent and title of the demandant.* And now a *writ of error* was brought in this court to reverse the judgment of the *Common Pleas*.

The case was very ably and elaborately argued in *Easter* term, by ABBOTT, for the *plaintiff* in *error* and DAMPIER, for the *defendant* in *error*, upon the same grounds as those taken in the *Common Pleas*; and they stated and examined all the precedents in the books upon the subject, and also the precedents in *formedon & juris utrum*.

Cur. adv. vult.

And on this day the judgment of the court was delivered to the following effect, by

Lord ELLENBOROUGH, C. J. After stating the case: "Two objections have been made: First, that it is not alleged in this writ of right that the ancestor, *Thomas Gamlyn*, from whom the demandant claims, was seised in his *demesne, as of fee and right*, but only in his *demesne as of fee*; and, secondly, that in deducing the right, there is a palpable error, in stating that *Hannah Dowland* was the *immediate heir* of *Wm. Dowland*, in which case, *Hannah Ball*, her mother, must have died before *Wm. Dowland*, and then *Thomas Gamlyn*, the father, to whom *Hannah Ball* is stated to be sister and heir, must also have died in the life-time of *Wm. Gamlyn*, in which case, he, and not *Hannah Ball*, would be heir to the same *Thomas Gamlyn*, the father. This is plainly contradictory and absurd; and this last objection was held to be fatal in the court of *Common Pleas*. It is now argued that this is not

* See the whole of the proceedings and the arguments at length in *Slade* v. *Dowland*, 2 *Bos.* and *Pul.* 570.

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erroneous, for that the allegation of the ancestor's being seised, as of right, is but matter of form, which it may be necessary to omit in some cases, because a *writ of right* may be founded on a *wrongful seisin.** But, it is now admitted that the precedents are all of a *seisin as of right*, and that there is not even the single exception which was supposed to have existed when the judgment was given in the court of *Common Pleas*.† It is also argued that it was not necessary to allege the manner in which the demandant is *heir*, by regularly deducing the descent, but that it is sufficient that *Hannah Dowland* is described as being cousin and heir of *Wm. Gamlyn*, and the rest may be rejected as surplusage, or the word *heir* is to be understood merely as a word of pedigree, importing that the person, who is stated to be *heir* of the other, would have been so in a certain case. We are, however, of opinion, that the judgment of the court of *Common Pleas* must be affirmed. They would have decided against the *plaintiffs*, in error on both points, but for one exception in the precedents, which does not exist, and it is too much to conclude that the allegation of the right may be omitted, because a *writ of right* may be maintained in certain cases on a wrongful seisin, merely from what is said by *Littleton*, in section 478; because again in s. 482, he states an objection to his own doctrine, namely, that the party shall not have a writ of right on such a wrongful seisin, because, when the *mise* is joined, it must be joined on the mere right, and then he answers that objection, from whence, and from the manner of that answer, it appears that the form in the count may still be the same, as was argued by Mr. DAMPIER. The precedents also of *Juris utrum*, which have been cited, do not hold

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* *Littleton*, s. 478 and 482; and Lord *Coke*'s Commentary on s. 482. *Co. Lit.* 280, b.

† See *Rastal*'s Entries, title *False Judgment*, pl. 9, fo. 323, b. ed. 1566.

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in this case, for both the writ and the count are different, and the general issue for the tenant is, that the lands are his lay-fee, and not held in *frank almoigne* by the church, as appears by the precedents in *Coke's Entries*, 400, cited by Mr. DAMPIER." His Lordship then proceeded to consider the other point, and cited *Bracton*, 372, b. where, after stating the form of the count in a *writ of right*, in which the descent is set out, he says, *Non enim sufficit simpliciter proponere intentionem suam, sic dicendo 'peto tantam terram ut jus meum,' nisi illam fundaverit, quod doceat ad ipsum jus pertinere et per quam viam et per quos gradus jus ad ipsum debeat decendere.* And in p. 373, b. he adds, *si autem, in narratione facienda aliquis articulorum prædictorum omittatur, et narratio a petente advocetur, ita quod error revocari non possit, et petens clameum suum pro se et hæredibus suis amitteret in perpetuum.* This same doctrine is also adopted in *Fleta*, lib. 6, c. 16. "These authorities, his Lordship concluded, are decisive to the second point of the objection on the deducing of the descent of the demandant, and therefore make it unnecessary to examine the authorities on the other question."

JUDGMENT FOR THE DEFENDANT IN ERROR.*

The KING *versus* PATTCHETT *alias* PAGET.—*June 16th.*

Semble. *The sessions may order a* rogue *and* vagabond *to be imprisoned, for not exceeding six months, and also to be whip-*

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* As this was a count and judgment on a writ of right in an inferior court, not of record, the objections, as to matters of form, were held to be open to the parties, upon general demurrer, the same as if it had been upon a special demurrer.

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at the sessions, to whip *only* the incorrigible rogue, and they may order him to be whipped several times.

LAWRENCE, J. "The seventh section enables him, *the* rogue and vagabond, to be passed, by the single justice, to his last place of settlement, and clause the ninth enables the quarter sessions to pass, "*such person, mutatis mutandis, as aforesaid.*" But according to your construction they cannot pass the rogue and vagabond to his settlement; for there is no power to do that at the sessions as to him, unless this latter part of the ninth section applies to him as well as the incorrigible rogue."

LORD ELLENBOROUGH, C. J. "Your construction is defective in leaving the rogue and vagabond *unpassed*, which was certainly one of the objects of this statute."

BALGUY. "There being a gradation of offences, there ought to be different degrees of punishment."

LAWRENCE, J. So there are, for the incorrigible rogue is to be confined for two years, or not less than six months, and the vagabond for not exceeding six months."

LE BLANC, J. "They have a power also of sending him to the land or sea service; here they have adjudged him to go into his majesty's service, without saying to which. Is not that defective?"

VAUGHAN, Serjt. in support of the order; "They may do that after the imprisonment is begun. The justices may at any time, during his imprisonment, adjudge him to be sent into his majesty's service by sea or land, if they shall think proper."

LORD ELLENBOROUGH, C. J. "The adjudication is "to his majesty's service either by sea or land;" and my doubt is whether they may not make hat good, by an

order at any time during his imprisonment; or whether they must make it a part of their sentence to determine which?"

Vaughan. "The reason of the thing shews that it ought to be left to his majesty's officers to determine; for he might be fit for one service, and not the other. They will have then an opportunity of judging during the imprisonment, whether he is fit to go to the one service or the other."

Le Blanc, J. "And, according to your argument, you must add also, 'whether he shall go at all."

Lord Ellenborough, C. J. In giving the ultimate opinion of the court; "This is a defective order in not appropriating to which service he shall go, for if they had not power to make this a part of their *sentence*, then it is bad, because they have done so, and if they had a power to make it a part of their sentence, they have done it defectively, by leaving it uncertain to which he is to go. As to the other point, it is still clearer. The words are "*where any offender against this act*," shall be committed, and the justices at the sessions adjudge "*such person*" a rogue and vagabond, or incorrigible rogue, they may order such rogue and vagabond to be imprisoned for six months, and such incorrigible rogue for two years. "*And during the time of such person's confinement, to be corrected by whipping*,' according to his offence, '*and such person*' may be passed '*mutatis mutandis as aforesaid*' and if 'such person' being a male, is above twelve years, he may be sent into his majesty's service. '*Such person*' in this clause is necessarily '*any person within the act*.' 'Any offender against this act', and '*such person*,' therefore, mean what persons but *every* such person within the act?' The first words as well as the last, shew that the rogue and vagabond is within this clause. The first words were not brought to our attention before."

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VAUGHAN, Serj. observed, that where any additional punishment is directed against the incorrigible rogue, the statute, in this clause, mentions expressly the incorrigible rogue, and does not use the words "*such persons*," but "*such incorrigible rogue*," thus clearly coupling them together in some respects, and separating them in others, but directing both to be whipped. He suggested that the order might, therefore, be good in part, and bad in part, and so might be sustained. But by the court—No—

THE ORDER OF SESSIONS MUST BE QUASHED.

THE KING *versus* the Inhabitants of PUCKLECHURCH.—*June* 16.

Where there is a hiring at weekly wages, and nothing is said as to the term, the hiring will be held weekly, as the wages. In this case there were other circumstances in corroboration of a weekly hiring, particularly the servant's obtaining an occasional increase of his wages, after summer or winter came, upon an application by the servant to the master, and without a previous running contract or stipulation for any time.

The KING *versus* the Inhabitants of PUCKLECHURCH.

ORDER of removal of *Thomas Pritchard*, his wife and child, from *Pucklechurch* in *Gloucestershire*, to *Westerleigh* in the same county; upon appeal, the sessions quashed the order. The pauper was settled in *Westerleigh*, but about ten years ago hired himself to *Thomas King* of *Pucklechurch*, for eight weeks ending at *Midsummer*, at 5s. per week, at which time he hired himself to the same master at 4s. per week till *Michaelmas*. At *Michaelmas* he entered into a new agreement, to live with his master for board and lodging and 2s. 6d. per week; but no time was mentioned for the duration of the contract. When summer arrived, he said to his master, "I

must have more now, I believe, master;" his master said, "How much more?" and his wages were increased, and so varied as the summer or winter succeeded. At such times when the alteration took place, there was no conversation as to leaving the service, or dissolving the contract. They took place at the beginning of the week. He entered and left his service on the same day of the week, Sunday. There was a general settlement at the time he left his service, and some dispute; he could not remember what it was. The pauper was more than once absent from his service, to see his friends, two or three days at a time, with his master's consent; he served in the whole five years and a quarter, and received money on account at different times, a guinea or more, but there was no complete settlement of wages, till he and his master parted; at the time, he was not paid as much as he thought he was entitled to; but whether on account of absence or not, he did not know.

ABBOTT and HALL, cited 2 *Const.* 197, 198, 200, 204, 205, 222. 5 *Term Rep.* 447. *Rex* v. *Long Whatton*, and 2 *East*, 425, *Rex* v. *the Inhabitants of Hanbury*; and contended that according to the principles deducible from those cases, the hiring of the pauper at *Michaelmas*, was a general hiring for a year; and that the payment of wages weekly had no reference to the duration of the contract of service, so as to make it a weekly hiring.

GIBBS, *contrà*, was stopped by the court.

Lord ELLENBOROUGH, C. J. "If nothing is said respecting the term of service, the circumstance of weekly wages will be sufficient to determine it to be a weekly hiring; but there, nevertheless, may be something more said, which will give it a different construction. In this very case, you cannot say, the first contract was a weekly hiring; it was expressly for eight weeks, but the payment

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weekly. He serves for the term, and afterwards he hires again till *Michaelmas*; that was a definite term, and therefore the payment weekly cannot have the operation of restraining the contract in that case to a weekly hiring; then there is a third hiring to live with the master for board and lodging, and 2s. 6d. per week; and in this hiring we have *a week* only to indicate the term, and the wages being to be paid weekly, in the absence of every thing else in the case, will determine it to be a weekly hiring. The other acts of the parties also shew that such was their understanding of it; they agree at *Michaelmas* about the future service, and nothing is said, except as to the weekly wages; and as this is the hiring stated on the record, it will be a weekly hiring if nothing more is stated. *The King* v. *Vere* was an express hiring for a year, and the master said to the servant, "You have been here a year, and I will pay you for a year." In another case there was a month's notice, which contemplates a term of more than one week, and so the wages weekly could not affect the hiring.

GROSE, J. "This is a hiring for a week. Many circumstances decide this. The servant says, 'Master I must have more wages.' The master says, 'How much?' the wages were thereupon increased, so that in *summer* they were more, and in *winter* less. It appears from this alone the hiring was for a week, otherwise the wages could not have been varied in the manner stated in the case."

LAWRENCE, J. expressed himself surprised that the case should come before the court.

LE BLANC, J. concurred.

Lord ELLENBOROUGH, C. J. "I hope it will be understood, so very plain a principle, as this is, that where

nothing is said as to the hiring, and the wages are weekly, it must be considered as a weekly hiring."

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The KING *versus* the Inhabitant of PUCKLECHURCH.

ORDER OF REMOVAL AFFIRMED.

REX *versus* OSMER.—*June* 7.

An indictment, stated that a writ to arrest one B. W. *issuing out of the weekly court of record of the town and county of the town of* Poole, *directed to one* T. B. serjeant-at-mace *of the said town and county of the town of* Poole, *was delivered to him to be executed, but did not state that* T. B. *was an officer for the execution of writs, or an officer of the court; and stated that he having arrested the said* B. W. *one* T. S. O. *&c. did make an assault on the said* T. B. *in the execution of his office, and rescued the prisoner: On arrest of judgment, held, that a* serjeant-at-mace *is not* ex vi termini *an officer for the execution of writs, and his authority does not sufficiently appear on the indictment, wherefore the* rescue *appears to be lawful, being in defence of liberty.*

REX *versus* OSMER.

THE *defendant* was convicted on an indictment in the town and county of the town of *Poole*, which stated that on the 14th day of *July*, 43 *Geo.* III. The mayor and senior-bailiff of the weekly court of record of the town and county of the town aforesaid by their certain writ, issued out of the said court, bearing date, &c. directed to *W. Critchill* and *Thomas Brown, serjeants-at-mace of the said town and county*; did command them, that they should take *Benjamin Willis*, if he should be found, &c. to answer *John Slark*, in a plea of trespass, &c. *which* same writ afterwards, and before the return thereof, to wit, on, &c. at, &c. was delivered to the said *Thomas Brown*, one of the serjeants-at-mace, of the said town and county, to be *executed* in due form of law by virtue of which said writ the said *T. B.* afterwards, and before

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the return thereof, to wit on, &c. did take and arrest the said *B. W.* in the same writ mentioned, by his body, and then and there had him in his custody, under and by virtue of the said writ." The indictment then stated "that the *defendant, Thomas Spearing Osmer* together with divers other persons, &c. afterwards, to wit, on, &c. with force and arms, at, &c. within the jurisdiction of the court aforesaid, in and upon the said *Thomas Brown then and there being one of the serjeants-at-mace aforesaid, in the peace, &c. and in the due execution of his said office then and there being* did make an assault, and did then and there beat and ill-treat him, and did keep and detain him in prison, &c. and him the said *Benjamin Willis*, from and out of the custody of the said *Thomas Brown* as aforesaid, against the peace, &c. against the will of the said *Thomas Brown*, unlawfully did rescue, &c." It contained also a count for preventing him from making the arrest, and also for false imprisonment 'being a serjeant-at-mace.' *In arrest of judgment*, it was insisted that the *serjeant-at-mace of the town and county of the town of Poole, was not ex vi termini* an officer for the execution of writs; that *Brown* was not stated to be an officer of the court or an officer appointed for the execution of writs; and that it was not stated that the writ against *Willis* was indorsed to hold to bail under the stat. 12 *Geo.* I. c. 29, and if it was not, the arrest would be illegal,* and the assault and rescue justifiable.

JERVIS and MOORE, A. *contrà*. "It will be intended, after verdict, that *Brown* was an officer of the court, and that the writ was good. Any writ *prima facie*, is a bailable writ. In the case of *Whiskard* v. *Wilder*, cited by the other side, *Dennison*, J. said that a good precept was set out in an action upon a bail-bond, it being set out that the *defendant* was arrested, without stating that the writ was indorsed for bail, as is required by

* *Whiskard* v. *Wilder*, 1 *Bar.* 333.

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the statute 12 *Geo.* I. If it is necessary that it should appear that *Brown* had authority to arrest *Willis*, then it is stated here that "the writ was delivered to *Brown* to be executed according to the exigency of the said writ, and that the said writ was delivered to him to be executed in due form of law; by virtue of which said writ he proceeded to arrest *Willis*. Now he could not proceed to execute the writ *according to law*, and arrest *Willis by virtue thereof* unless it was a good writ, for if he proceeded illegally, he would arrest by *colour* of the writ* only, and not by *virtue* thereof.

Lord ELLENBOROUGH, C. J. "The expression *by virtue of the writ*, only means, according to the terms of it, which may be either legal or not."

MOORE. "It does not appear in the indictment, who is the proper officer of the court; but the prosecutor is stated in the writ itself to be a *serjeant-at-mace*, and it, therefore, must be presumed, after verdict, that he is the proper officer."

Lord ELLENBOROUGH, C. J. "It does not appear, by any allegation in this indictment, that he is the proper officer of the court."

MOORE. "It is incident to every court to appoint a proper officer; 1 *Roll's Abr.* 526, pl. 1. 'If the king grant a court by letters patent, to hold pleas, &c. although there is not any clause to empower them to make a bailiff to serve process, and to summon a jury, yet it is incident to the grant."

Lord ELLENBOROUGH, C. J. "Have you any case to shew that the directing a writ to any person constitutes him a proper officer?"

* *Cro. Jac.* 473.

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Moore then cited *Long*'s case,* to shew that the court would not make a forced construction, in order to make the indictment bad; and said that it would be a forced construction to presume, that the court of the town of *Poole* did not know who was their proper officer for executing their process, or that they wilfully directed the writ to an improper person. In *Rastal*, 167, 3d and 4th column, there are precedents, in which it is stated that the writs were directed *ministro ejusdem curiæ*.

Lord Ellenborough, C. J. "*Ministro* must necessarily mean that the person was minister or officer at the time, and it is also "*ministro ejusdem curiæ*."

"*Brown* is stated to be a serjeant-at-mace for the town and county of the town of *Poole*, and that is equivalent to *minister ejusdem curiæ*, which would have been good. At least the jury have found sufficient to sustain the judgment, for they have found the assault, and the rest is only a circumstance of aggravation; as in *trespass* for hunting brought under the statute 4 and 5 *W.* and *M.* against a *defendant*, as a dissolute person, if the *plaintiff* prove the trespass, but not the special circumstances of the *defendant* being a dissolute person, he is entitled to a verdict, though not to his costs beyond 40*s*. *Pallant* v. *Roll*.†

Lord Ellenborough, C. J. "They might have acquitted him of part of the indictment, and found him guilty of the rest; but when they find him guilty of the whole indictment, do they not also find that it was a justifiable assault on a person arresting *Willis* without authority."

Lawrence, J. "The result of the verdict is, that *Osmer* has been found guilty of an assault against a man

* 5 *Co. Rep.* 121. † 2 *Black.* 900.

in the due execution of his office, who yet does not appear by the verdict to have been in the due execution of his office, since it does not appear what was the nature of it."

MOORE. "If the words *then and there being one of the serjeants at mace aforesaid,* are omitted, it will still appear to be averred that he was in the due execution of his office, and that will be sufficient to support the verdict."

Lord ELLENBOROUGH, C. J. "But it must also appear that his office had something to do with the execution of the writ. The first objection is decisive, he is not stated to be a *serjeant at mace of the court,* and if he is not so, then he has no authority to make the arrest, and the assault is not illegal; for it is in the defence of his own liberty, or if it is in the defence of another, who is illegally arrested, it is even in that case not a breach of the peace."

The rest of the court assenting,

THE RULE FOR THE JUDGMENT TO BE ARRESTED WAS MADE ABSOLUTE.

END OF TRINITY TERM, 1804.

AN

INDEX

OF

THE PRINCIPAL MATTERS.

ABATEMENT.

1. PLEA in abatement, averring that the promises in the declaration, if made at all, were made, &c. is verified by affidavit actually sworn before the declaration is filed, but turns out to be applicable, in fact, to the declaration, which is on promises: Held, well filed, and not a nullity; and the plaintiff cannot sign judgment as for want of a plea verified by affidavit. *Lang* v. *Comber*, *M.* 44 *Geo.* III. 108

ABSTRACT OF TITLE, *see* DEVISE, 8.

ACKNOWLEDGMENT OF DEBT, *see* LIMITATIONS, STATUTE OF, 1.

ACKNOWLEDGMENT by principal of the act of agent, *see* AGENT.

ACTION.

1. No action will lie at the suit of a father for seducing his daughter, *per quod servitium amisit*, where the daughter does not reside in the father's family, and has no intention of returning to it, although she is not residing as a hired servant elsewhere. To support this action, there must be some appearance at least of the relation of master and servant still subsisting between the father and his daughter. *Anonymous*, *E.* 44 *Geo.* III. 333

And see *Johnson* v. *M'Adam*, there cited.

2. The 39 *Geo.* III. c. 69, s. 185, which extends the 24 *Geo.* II. c. 44, to the lord mayor, aldermen, and justices, under the authority of the same act, and further enacts that no action shall be brought against any person for any thing done in pursuance or under colour of the act until after fourteen days notice, &c. extends to acts done by the *West India* Dock company; and therefore an action against the treasurer for wrongs done by the company under the colour of the act, he being, in all cases, the nominal plaintiff or defendant for them under the act, fourteen days notice must be given previous to the action. *Semble*, It is otherwise in actions founded on contracts with the company. *Wallis* v. *Smith*, *E.* 44 *Geo.* III. 347

3. On WARRANTY OF HORSE, *see* WARRANTY, or *Strode* v. *Dyson*, *E.* 44 *Geo.* III. 400

4. An action being brought upon a joint contract against *A.* *B.* and *C.* two of them, *A.* and *B.* paid the damages and costs: and afterwards *A.* brought his action against *C.* for his share paid for his use: Held, that the damages, having been paid by *A.* and *B.*

by means of their joint bill of exchange on a banker, this was a payment by them out of a joint fund between them, and that the action against *C.* should have been in both their names. *Semble*, it would have been otherwise if the money had been paid by each out of his separate funds, there being at the time of the payment no general partnership between them. *Osborne* v. *Harpur*, *T.* 44 *Geo.* III. 411

5. *A.* compounded with his creditors, and paid *B.* one of his creditors, 7s. in the pound on his whole debt, for which he gave a receipt in full: *A.*, however, promised to pay the residue when he should be able: *B.* brought assumpsit against *A.* for the original cause of action, and gave proof of his ability to pay: Held, that this composition being only in consideration of a less sum, was not such a payment in satisfaction as to extinguish the original debt, and therefore that the plaintiff need not be put to declare upon the special agreement made subsequently. *Fetil* v. *Sutton*, *T.* 44 *Geo.* III. 415

6. ACTIONS for not-accepting stock, *see* STOCK JOBBING.

7. ACTIONS *consolidating* of, *see* PRACTICE, No. 17.

8. *A.* a *feme sole*, covenanted with *B.* to abide the award of *C.* and, before the making of the award, married. When the award was afterwards made, *B.* brought covenant against the husband of *A.* jointly with *A.* and declared on a breach for non-payment of a sum awarded to be due to him, and, upon the general issue pleaded, had a verdict. Held, upon motion in arrest of judgment, that the intermarriage of *A.* was a revocation of her submission, and therefore the award was void: but that the marriage itself was, for that reason, a breach of covenant; and therefore, it appearing on the face of the declaration that the defendant married before the making of the award, it was sufficient after verdict, and the plaintiff accordingly had judgment. *Semble*, if the marriage had been with the consent of the plaintiff, the defendants should have pleaded it in bar. *Charneley* v. *Winstanley*, *T.* 44 *Geo.* III. 433

9. In an action against the marshal for an escape on *mesne process*, the plaintiff declared on a commitment on habeas corpus by a judge at chambers, with a *pros: patet per recordum*, and on the trial produced no record in evidence, but the writ from the office of the clerk of the papers of the *K. B.* prison: Held, that this is only *quasi* a record, but good evidence, there being no mode of recording such a commitment in practice, and the *prout patet* is surplusage. *Aliter* in the case of a commitment in execution. *Wigley* v. *Jones*, *T.* 44 *Geo.* III. 457

10. Of actions against carriers by water, *see* CARRIER.

11. Of trover by three assignees of a bankrupt, where a fourth has been removed, but there has been no reassignment, *see* BANKRUPT, No. 7.

ACTIONS CROSS,
See PRACTICE, 10.

AFFIDAVIT,
See ABATEMENT, 1. PRACTICE, 8.

AFFIDAVIT OF DEBT,
See PRACTICE, 5.

OF ENTITLING AFFIDAVIT.
See PRACTICE.

ARBITRATORS.
See ASSUMPIT, 3. AWARD, COSTS, 3.

AGENT.
See TROVER.

Semble. Under a power of attorney by *A.* to *B.* "to underwrite any policy of insurance not exceeding 100l. and to subscribe the same in his (A.'s) name, and to settle and adjust losses, &c."

Although *B.* cannot delegate his whole authority to another, yet, having signed a slip for a policy of insurance, the signature of his clerk for him, and in his absence, to a policy made in pursuance thereof, is a good execution of the power, that being only a ministerial act, which he might authorize another to do for him; but he must himself execute the power, in all matters in which his judgment and discretion are requisite. In the present case, the policy, after it was so executed by the clerk for *B.* having been shewn to *A.* who then offered terms of settlement, it was held, that *A.* had adopted the act of *C.* *Mason* v. *Joseph*, *T.* 44 *Geo.* III. 406

Of COVENANT *by* AGENT.
See PLEADING, No. 3.

AGREEMENT.

See INSURANCE, No. 1.
RESPONDENTIA.

1. An agreement to relinquish to others the business of an attorney and solicitor, and to permit them to use the name of the person so relinquishing business, he not intermeddling therewith, is valid in law. Also, where there are several considerations mentioned in a deed, though one is bad, the deed is good for the rest, unless where the deed is rendered void by act of parliament. *Bunn* (Executor of *Bunn*) v. *Guy*, *M.* 44 *Geo.* III. 1

2. Agreement for settlement on marriage, executed or altered by husband after bankruptcy. *See* BANKRUPTCY, No. 1.

3. A creditor signs a deed to give his debtor time for payment of the whole of his debt, upon having security for part, and several other creditors are thereby induced to sign the deed; but at the same time he secretly obtains the security of a third person for so much as stands in the trust deed on the personal security of the debtor alone: Held, that this is a fraud upon the other creditors, and the additional security is void. *Semble.* The case of *Frise* v. *Randall* can only be supported on the ground that no fraud was understood to have been effected on the creditors. *Leicester* and others v. *Rose*, *M.* 44 *Geo.* III. 41

4. A tenant of a farm entitled to the way-going crop of the harvest 1801, after his term expired, and paying rent up to the Lady-day preceding (previous to that day, viz. in June, 1800,) agrees to let in the new tenant, and sells the standing crops, and takes a receipt for the value thereof, and also for 20l. "for the right of cropping the lands from June 18th:" Held, that, by this sale of the right of cropping, the tenancy is not to be considered as changed, and the out-going tenant must pay the rent for the time from Lady-day, 1800, to Lady-day, 1801. The out-going tenant had paid tythes and poor's rate for that time. *Petrie* v. *Daniel*, *H.* 44 *Geo.* III. 661

5. 1st. Decree for specific performance—purchase by a father whose son was a trustee, for the sale of defendants' estates: Held good, there being no positive proof of fraud. 2d. Question, whether an auctioneer's clerk, under a general authority to act in his master's absence, could sign a contract for sale of an estate according to the statute of frauds: Held, that he could, where the party selling knew that he was so to act. 3d. Whether, where the clerk of an auctioneer signs the contract as a witness for his master (the agent authorized to sell the estate), he can be considered as a contracting party according to the statute of frauds: Held, that he could. *Coles* v. *Trecothick*, in Canc. 233

6. *See* BANKRUPT, No. 6, or *Parsloe* v. *Dearlove*, *H.* 44 *Geo.* III. 281

7. Every memorandum of an agreement in writing under the statute 29 *Geo.* II. c. 3. s. 4, to

charge a defendant on a special promise, for the debt, default, or miscarriage of another, must be mutually binding on each party, and contain some memorandum or notice of the consideration of the promise, otherwise it is void, and the consideration cannot be supplied by parol, at least where the writing is wholly silent on that head. *Wain* v. *Walters*, *E.* 44 *Geo.* III. 299

8. Two parties submitted to arbitration by bond, and agreed therein that the submission to the award should be made a rule of court, and afterwards, by a memorandum indorsed on the bond, after the time of making the award had expired, agreed that the time for an umpire to make his umpirage should be extended to a future day, but without expressly mentioning that this new submission should be made a rule of court: Held, that this memorandum was a virtual incorporation of all the terms of the bond not inconsistent therewith, and therefore must be taken as containing an agreement to make the submission a rule of court, under the statute 8 & 9 *W.* III. c. 15. The case of *Jenkins* v. *Law*, 8 Term. Rep. 87. was overruled, upon consultation with the other courts. *Evans* v. *Thompson*, *E.* 44 *Geo.* III. 380

9. *See* DEVISE, 16, as to agreement to make a good title.

10. *Copy of agreement to be given by attorney*, at request of parties *See* PRACTICE, No. 16. or 399

11. Agreement as to a way-going crop. *See* LANDLORD and TENANT; or *Petrie* v. *Daniel*, *H.* 44 *Geo.* III. 199

ALIEN.

See FREIGHT—INSURANCE, &c.

AMENDMENT.

See PRACTICE, No. 1, 18.

ANNUITY.

1. In a case on the annuity act the court enlarged a rule for the parties in the mean time to bring an action on the bond, and the defendant to take issue on the payment of the consideration in the very words of the act, in order to raise the question whether it is necessary to state in the memorial the actual hand by which the money is paid. *Eastland* v. *Forrester*, *E.* 44 *Geo.* III. 356

ANSWER IN CHANCERY.

See PRACTICE IN CHANCERY, No. 5.

ARREST, RETURNING HOME FROM A TRIAL.

See PRACTICE, No. 11.

ARREST FOR MORE THAN THE PLAINTIFF RECOVERS.

See PRACTICE, No. 21, 22.

ASSAULT.

See INDICTMENT.

1. To trespass, for assault and false imprisonment, the defendants pleaded a commitment of the plaintiff, by them, as justices, for want of sureties until the next sessions, for a misdemeanor on the stat. 1 *W.* & *M.* c. 18, s. 18, giving a penalty of 50l. to the crown, and, before the sessions, the prosecutor, with the consent of the defendants, agreed to the discharge of the plaintiff; and thereupon, at the sessions, he was discharged by the court, and accepted such discharge, in satisfaction of the assault and false imprisonment: Held bad on demurrer; for the making up a prosecution for a public misdemeanor is illegal, and no satisfaction; and if there was any satisfaction, it moved from the prosecutor, and not from the defendants *Edgcumbe* v. *Rod*, *T.* 44 *Geo.* III. 515

ASSETS.

See BANKRUPT, 5.

ASSIGNEE, REMOVAL OF.

See BANKRUPT, No. 7.

See LIMITATIONS, *statute of*; MARRIAGE ARTICLES; *see* AGREEMENT, 7.

1. Assumpsit, for that *S. F.* B. deceased, being indebted to the plaintiff at the time of his death, *N.* the wife of the defendant, before her intermarriage, in consideration thereof, and in consideration that the plaintiff, at her request, would forbear and give day of payment of the said debt, undertook, &c.; Held ill on special demurrer, for not stating either that N. or any other person was liable to be sued. A general forbearance, like the forbearance of an individual, is not a good consideration, unless there is somebody to be forborne. *Jones* v. *Ashburnham and Wife*, H 44 *Geo.* III. 188

2. A surgeon attends a pauper for some time, giving credit to the pauper's father for payment of his bill; but he becoming unable to pay, and the pauper still continuing ill, the surgeon applies to the overseers of the poor, to know whether he shall continue his attendances at their expence; they say they will give no authority, but if he brings in a reasonable bill, they will see it paid. Upon motion for a new trial, held, the attendance of the surgeon being divisible, he may recover for the latter attendances on the credit of the overseers, without proving a promise in writing. *Lyde* v. *Higgins*, E. 44 *Geo.* III. 305

3. Assumpsit against the drawer of a bill of exchange drawn in America, on a merchant in London, protested for non-acceptance; plea of bankruptcy, certificate, and discharge thereby in America. Held, that the parties being resident in America at the making of the bill, this is a good discharge here, if it is so in America; for the contract declared upon arises solely in America. The engagement of the drawer is, that he will pay in America, if the bill is not accepted in London. *Potter and another* v. *Brown*, E. 44 *Geo.* III. 351

4. By an order of *Nisi Prius*, a verdict was taken for 30l. and 40s. costs, subject to arbitration, and the costs of the cause were to abide the event of the arbitration, and a verdict was to be entered for such sum only, if any, as should be found to be due. The arbitrators awarded 7ol. to be due: Held, that the plaintiff could not, on this award, recover either the 70l. or the 30l. For the arbitrators had no power to award more than 30l. and it is probable they might not have awarded even 30l. had they not taken something into their consideration which they ought not to have done. Semble. If the arbitrators had awarded the 30l. distinctly, according to their authority, and added an adjudication that 40l. more was still due, the court might have held the award good in part.—Q. Whether the court, upon motion, will permit the plaintiff to have execution for 30l. and costs? *Bonner* v. *Charlton*, E. 44 *Geo.* III. 362

5. Assumpsit by executors containing two sets of counts, one upon promises made with the testator: the other stating that the defendant being indebted to the testator for goods sold, after his death, promised to the plaintiffs, executor, and executrix, as aforesaid, to pay, &c.; also, that the defendant accounted with the plaintiffs as executrix and executors as aforesaid, concerning money due to the plaintiff, executrix, and executors, as aforesaid, and being thereupon found indebted to the plaintiffs, executrix and executors as aforesaid, promised to pay them, executor and executrix, as aforesaid: also, containing a count for interest due to the plaintiffs as executrix and executors: Held, on error, that the count on an account stated, could not be joined with the counts for goods sold, &c.

Q. Whether a count upon promises with one as executor, can be joined with others on promises with the testator. *Henshall* v. *Roberts and Another*, E. 44 Geo. III. 375

6. *Assumpsit for* TITHES, *see* LONDON COURT OF CONSCIENCE.

7. In assumpsit by an executor for goods sold and delivered, the delivery was proved by one witness, but he also swore that he was partner with the deceased, notwithstanding, from a paper written by himself, the debt appeared to have been due only to the deceased; the jury found a verdict for the plaintiff for 81. 14s. and, notwithstanding the smallness of the debt, the verdict was set aside. *Semble*, The jury cannot give credit to part of the testimony of a *single* witness and reject part. *Madge, Executor of Thomas*, v. *Fear*, T. 44 Geo. III. 409

8. *A.* a captain of a Dutch ship, took *B.* on board, at the Island of Demarara, together with his luggage and family, to carry him to Flushing, in Holland; the ship was captured as prize to a British ship of war, and libelled with the cargo in the British court of Admiralty; *B.* the passenger was released and his luggage, *de facto*, restored to him, but not by adjudication of the court; such part of the cargo as was British property was restored to the owners, and the rest condemned as prize. The vessel was claimed by a British subject. Pending the suit in the Admiralty, *A.* brought assumpsit against *B.* for the passage money, with a *quantum meruit pro rata itineris*: Held, that the plaintiff could not recover; at least, not until the court of Admiralty had decided on the question of prize. The plaintiff was therefore nonsuited. *Semble*, passage money is the same as freight. *Mulloy* v. *Backer*, T. 44 Geo. III. 447

ATTACHMENT, *for non-payment of* Costs.
See COSTS, No. 2.

ATTORNEY.
See LONDON *Court of Conscience act.*
See AGREEMENT, No. 1, or *Bunn, executor*, v. *Guy*, M. 44 Geo. III. 1
Infant employing an attorney, *see* PRACTICE IN CHANCERY, No. 2. *Power of, see ante*, AGENT, No. 1. *Mason* v. *Joseph*, T. 44 Geo. III. 406
See PRACTICE, No. 16, *as to giving copies of Deeds, &c. to parties in a cause.*

AUCTIONEER.
See AGREEMENT, 5. DEVISE, 8.

AWARD.
See PRACTICE, No. 11, *(of entitling affidavits)*, No. 12, *(of agreement to make submission a rule of court)*, *see* ASSUMPSIT, 3. COSTS, No. 3.

BAIL.

1. Time refused to be enlarged for the bail to surrender the principal, where he is detained in a foreign country by order of the government there. *Grant* v. *Fagan*, M. 44 Geo. III. 12

BAIL-BOND.

BAIL, DEPOSIT IN LIEU OF.

1. Where money is deposited with the sheriff in lieu of bail, under the statute 43 Geo. III. c. 46, s. 2, the court will, upon bail being put in and perfected, order it to be repaid to the bail, or other person by whom it was actually deposited, and not to the defendant. *Nunn* v. *Powell*, M. 44 Geo. III. 13

2. On payment of money to the sheriff upon an arrest, it will be presumed that it was paid as a deposit in lieu of bail, under the stat. 43 Geo. III. unless a discharge, or some acknowledgment in writing, be given to the defendant for the debt and costs. The payment of the debt with 10l. raises a strong presumption that it is not an absolute payment in

discharge of the debt and costs. *Wain* v. *Bradbury*, *H.* 44 *Geo.* III. 127

BANKRUPT.

1. An agreement made before marriage, and a deed of settlement pursuant thereto after marriage, will bind the creditors in case of the bankruptcy of the husband; but there being a mistake in the articles and settlement in this case, which were altered by the consent of all parties, and re-executed without a new stamp, after the bankruptcy: Held, that the alteration being not even in pursuance of a parol agreement before marriage, did not bind the creditors; and yet that, notwithstanding the alteration and re-execution, the deed and articles were good as to the original stipulations, for they could not be avoided without the consent of the *feme*, who, by reason of her coverture, could give no consent. *Shaw* v. *Jackman*, *M.* 44 *G.* III. 14

2. Those who are parties and privies to an assignment of all a trader's effects, cannot sue out a commission upon it as an act of bankruptcy; but a commission being sued out by a person not privy to the assignment, they may be chosen assignees. A trader agreed to execute an assignment of all his effects to trustees for the benefit of creditors, which was accordingly prepared and executed by him, and a great part of the creditors: the bankrupt executed the deed with an intention of carrying it into effect; but the creditors had previously concerted amongst themselves, that it should be used only for the purpose of making him a bankrupt, and did not communicate that intention to him; another creditor, who had never assented to the deed, sued out a commission. Held, that this was an act of bankruptcy in the trader; the purpose of a fraudulent conveyance being effected by him as far as it was in his power to do it. *Tappenden* et al. v. *Burgess*, *M.* 44 *Geo.* III. 34

3. A commission of bankruptcy cannot be taken out by a person who is appointed and acts as a trustee under a deed of assignment for the benefit of creditors, although he does not actually execute the deed. *Ex parte Whalley* in re *Whalley*, *M.* 44 *Geo.* III. 118

4. Where a docket is struck for a commission of bankruptcy, although the commission is not issued within the time limited by the general order, yet a second commission cannot be sustained without an order of *supersedeas* for the first. In re *Hall* ex parte *Dods*. 120

5. A testator directed that his trade should be carried on after his death by his wife, for the benefit of herself and children; and, for enabling the wife so to do, he authorized his trustees to permit her to retain the stock in trade upon her giving notes of hand bearing interest, and also to advance out of his personal estate 600l. as a capital to carry on the business. The widow becoming bankrupt, the trustees were permitted to prove the notes for the stock in trade, and the 600l. advanced. These proofs the Chancellor, on a former petition, ordered to be expunged, reserving the point, whether, where a testator directs his executor to carry on his trade, not only the part embarked in obedience to that direction, but the whole be liable to all the debts to which the concern is subject? Held, that the part directed to be embarked is alone liable, contrary to the decision in *Hankey* and *Hammond*. *Ex parte Garland in re Ballman* in Canc. 220

6. A schoolmaster takes the son of *B.* to board for half a year, ending the 24th of June; the son is taken home for the holidays on the 18th; *B.* becomes bankrupt on the 20th: Held, the half year's board is not a debt

provable under the commission against *B.* and therefore not barred by his certificate. *Semble*, The statutes, 7 *Geo* I. c. 31, and 5 *Geo.* II. c. 30, apply only to the written securities therein mentioned, and debts secured thereby. *Parsloe* v. *Dearlove*, *H.* 44 *Geo.* III. 281

7. Where one of four assignees of a bankrupt is removed by order of the *Lord Chancellor*, without appointing another or a new assignment being made by the commissioners, or a re-assignment by such removed assignee, the three remaining assignees cannot maintain trover for the whole of a ship belonging to the bankrupt, but only for three-fourths thereof, for the whole property in the bankrupt's effects is not vested in them by such order of removal alone. *Bloxam* v. *Hubbard*, *T.* 44 *Geo.* III. 487

BARON AND FEME.

See PRACTICE, No. 4, or *Cooper* v. *Hunchin*, *H.* 44 *Geo.* III. 282

See ACTION, No. 8, as to revocation, by marriage, of submission, by a feme sole, to arbitration.

BILLS of EXCHANGE, &c.

See ASSUMPSIT, (3), &c.

BILLS of LADING.

1. A. purchases and ships goods for B., and sends a bill of lading, unindorsed to him. The goods are received by B., who sends the bill of lading to C., to satisfy a debt; he gets possession of them; B. then becomes bankrupt. A. sends the bills of lading indorsed to his correspondent, to secure the amount of the bill, drawn on B. on account of the goods: Held, that B. has only the right of stopping in transitu, and the indorsee of the bills of lading cannot maintain trover for the goods. Bills of lading pass the property in goods, only when for a valuable consideration, and without notice of a prior claim, and are not analogous in all respects to bills of exchange. An agent who purchases goods for another has the same right of stopping in transitu as the original seller *Coxe* & al. v. *Harden*, *M.* 44 *Geo.* III. 20

CA. SA. *see* PRACTICE, 5.

CARRIER.

1. A. a common carrier by water gave notice that "he would not be responsible for any loss or damage to any cargo put on board his vessels, unless it happened by want of ordinary care and diligence in the master or crew, and then only to 10l. per cent. on the amount of the loss, and not beyond the value of the vessel and the amount of her freight; and that, if any person desired to have goods carried free of any risk, in respect of loss or damage, whether by the act of God or otherwise, they must make a special agreement on payment of extra freight:" Held, that notwithstanding this notice, the carrier is answerable for the whole of any loss or damage arising by his own default, as in case the vessel, at the time of loading, be leaky and not seaworthy. The notice applies only to losses by reason of the default of others, not of himself. *Lyon and Another* v. *Mells*, *T.* 44. *Geo.* III. 478

CASES *overruled*.

Jenkins v. *Law*, 3 *T. Rep.* 87, *see* AGREEMENT, 8.

Rex v. *Inhabitants of Gamlingay*. *See* PLEADING, 19.

Feise v. *Randall*, *see* AGREEMENT, 3.

CERTIORARI.

See COSTS.

And *Rex.* v. *Nottingham*, 31.

CHARTER.

See CORPORATION.

CHARTER-PARTY.
See PLEADING, 3.

CHILD, CUSTODY OF.
See HABEAS CORPUS.

COALS.

1. In an action on the 3 *Geo.* III. c. 26, s. 4, imposing a penalty on persons selling one sort of coals for another, a contract was proved in Middlesex for the sale of Wall's End coals, without specifying a particular parcel, and the defendants afterwards fraudulently delivered other coals to the vendee in London: Held, that the sale not being complete until delivery, the venue should be in London. In the same case the coals delivered were deficient in quantity, there not being three lawful bushels, of the bushel of 22 *Anne*, put into each sack: Held, that under the 13th section of the statute 3 *Geo.* II. c. 26, the true quantity should have been put into the sacks in Middlesex, where they were filled; and this being a local omission of a local duty, the venue in a count for this offence should be laid in Middlesex. *Butterfield qui tam* v. *Windle*, 44 *Geo.* III. 66

2. To found an action against the vendor of coals, not having obtained a coal meter's ticket, for a penalty of 50l. on the 19th *Geo.* II. c. 35. s. 11, the plaintiff need not proceed to convict the offender before a justice of the peace, though that clause of the act contains the words being thereof convicted by the oath of two credible witnesses before one or more justices, &c. For by the 21st clause, which enacts, that all penalties above 5l. shall be recovered by action in the superior courts, those words must be taken to apply only to the case of the 5l. penalty upon the carter, imposed by the same 11th clause. *Semble*. A coal waggon is within the clause, though the act contains only the words cart or carts. *Peto qui tam* v. *Hague*, T. 44. *Geo.* III. 417

COMMITMENT on *Habeas Corpus*.
See HABEAS CORPUS, or ACTION, 9.

COMPOSITION *with Creditors, how far a discharge*.
See ACTION, No. 5.

CONDITION.

See COPYHOLD, No. 1, and *Doe dem Nunn* v. *Lufkin*, 90.
LANDLORD and TENANT, *ibid.*

CONFIRMATION.
See AGENT, &c.

CONSOLIDATING ACTIONS, *penal actions*, not to be consolidated, *see* PRACTICE. No. 17, or *Benton* v. *Praed*, T. 44. *Geo.* 423.

CONSIGNOR and CONSIGNEE.
See TROVER.
Coxe and Others v. *Harden and Others*, M. 44. *Geo.* III. p. 20.

CONSTABLE.
See TRESPASS.

CONTRACT.
See AGREEMENT.

CONVICTION.

1. The act of selling a single piece of plate exceeding five pennyweights, does not constitute a trading within the stat. 31 *Geo.* II. c. 3. s. 6, so as to subject the party to a penalty for not taking out a licence. *Rex* v. *Buckle*, M. 44 *Geo.* III. 49

2. *Semble*. The sessions may order a rogue and vagabond to be imprisoned for not exceeding six months, and further to be whipped as well as an incorrigible rogue, under stat. 17 *Geo.* II. c. 5, s. 9, and to be passed, or to be employed in either his majesty's sea or land service, at any

time before the end of his confinement, but, a conviction at sessions adjudging a rogue and vagabond, above twelve years of age, to be sent and employed, at the end of his confinement, in his majesty's service, without saying in which service, was quashed for informality. For if this order ought to be made a part of the sentence, it is defective; or if it ought not, then it is bad in that respect. *Rex* v. *Paget, T. Geo.* III. 547

CONVEYANCE FRAUDULENT.

See GUARDIAN.

COPYHOLD.

See DEVISE (6).

1. A copyholder leases for one year certain, and at the end thereof, from year to year, for thirteen years more, (in all fourteen), if the lord will give licence, and so as the same, or any part thereof, shall not become forfeited, or liable to forfeiture, with a covenant for quiet enjoyment of the said term; and also, in a certain case, for the lessor to re-enter on any part, upon giving one year's notice, and making satisfaction to be settled by arbitration. The copyholder afterwards surrenders to a trustee for the lord, with notice of the lease, and a reservation of all subsisting leases. The lord withholds his licence, but receives quit-rents, and his trustee gives notice to quit: Held, that the lease is only from year to year, and no forfeiture, the licence of the lord being a condition precedent; that the tenant being ejected, his only remedy, if any, is in equity. *Doe* d. *Nunn* v. *Lufkin, M.* 44 *Geo.* III. 90

2. On a conditional surrender of copyhold lands, by way of mortgage, the legal estate remains in the mortgagor until the admission of the mortgagee, and will not pass by the will of the mortgagor, or his heirs, without surrender to the use of the will. *Doe dem Shewen* v. *Wroots and Others, E.* 44 *Geo.* III. 363

CORPORATION.

1. *See* The *King* v. *Thornton, M.* 44 *Geo.* III. 109

2. Indictment on statute 11 *Geo.* I. c. 4. s. 6, against a bailiff of a corporation, for not attending at the election of a new bailiff: Held, that as he was not one of the electors of the new bailiff, under the charter, his absence could not impede or hinder the election; and he, therefore, was not within the statute. The statute does not make the attendance of the mayor, bailiff, or chief officer, necessary, where it is not so by the charter. *Rex* v. *Corry, T.* 44 *Geo.* III. 538

COSTS.

See PRACTICE, and PRACTICE IN CHANCERY, No. 2.

1. Where an indictment has been originally preferred and found at a sessions for a city, and removed into the court of King's Bench by writ of *certiorari*, and then sent down to be tried by a jury of the county at large, it is not necessary that the party removing it should enter into a recognizance in the sum of 40l. under the statute of 38 *Geo* III. c. 52, s. 12. *Rex* v. *Nottingham, M.* 44, *Geo.* III. 31

2. Rule obtained, on affidavit by several persons, inhabitants of a parish, to shew cause why a presentment against the inhabitants should not be discharged, &c.: This rule being discharged with costs, the court granted an attachment against these persons for non-payment of the costs of the rule, and not against the inhabitants. *The King* v. *the Inhabitants of New Windsor.* 168

3. Where the rule to return a writ expires in vacation, the sheriff has till the next term to return it. Such a return before the sitting of the court on the 1st day of the subsequent term was held

good. Q. Whether he has not three days in that term? *Anonymous*, T. 44 *Geo.* III. 427

4. Of costs to *defendant*, where plaintiff recovers less than he arrests for, *see* PRACTICE, No. 21, 22.

COVENANT.

See PLEADING.

1. Negative and disjunctive covenants, performance of covenants generally, 106. *Hall* v. *Cazenove*, H. 44, *Geo.* III. 272

2. (*Independant covenants*) *see* PLEADING.

3. *See* ACTION, No. 8, or *Charnley* v. *Winstanley and Wife*, T. 44 *Geo.* III. 433

PLEADING, No. 3.

COURT of *Conscience.*

See LONDON.

COURT *of* PRIZE.

See PRIZE.

CREDIT

To be attached to a witness, in whole, or in part, *see* EVIDENCE, No. 4.

CREDITORS.

See AGREEMENTS, and *Leicester* v. *Rose*, M. 44 *Geo.* III. 41

CUSTOMARY ESTATE.

See DEVISE, 7.

DAUGHTER, *Seduction of.*

See ACTION.

DEBTOR and CREDITOR.

DECLARATION.

See PLEADING, *passim.*

DEDIMUS POTESTATEM TO EXAMINE WITNESSES.

1. The custody of an examination, taken under a *dedimus* in the country, belongs to the clerk in court, who is entitled to make the copies of it. If sworn in town, it belongs to the master. *Drake* v. *Woodford*, in *Canc.* 116

DEED.

See EVIDENCE, No. 3.

PRACTICE in CHANCERY, No. 3.

See *Shaw and Another, Assignees of Hill, a Bankrupt*, v. *Jackman*, M. 44, *Geo.* III. (*or see* BANKRUPT, No. 1.) 14

1. A charter-party, purporting to be indented, made, and concluded, the 6th day of February, whereby it is agreed that the ship shall proceed from Deptford, on a voyage to Demarara, on or before the 12th of the same month, and by which the owner covenants that she shall proceed on her intended voyage on the day before mentioned, is actually executed by both parties on a day subsequent, viz. the 15th of March following, while the ship is still lying in the river. The ship sails after the 12th of February, and performs her voyage. The owner brings covenant for the freight, averring that the charter-party was indented, made, and concluded, after the day of the date, and after the 12th of February, and averring the performance of all which on his part was possible to be performed: Held, upon special demurrer, that the plaintiff was not estopped from alleging that the deed was indented, made, and concluded, after the day it bears date. 'Concluded' implies delivery of the deed. *Semble.* The covenant that the ship should sail before the 12th is not a condition precedent, but rather an independent covenant. Held also, that if it be a condition precedent in terms, yet it having become impossible at the time of making the deed, within the knowledge of both parties, it is no part of the real contract between them, and the plaintiff having performed the voyage, which is the substance of the contract, is entitled to his

freight *Hall* v. *Cazenove*, *H.* 44 *Geo.* III. 272

DEMURRER BOOK.

See PRACTICE, 31.

DEPOSIT *of Money in Lieu of* BAIL.

See BAIL, deposit in lieu of.

DEVISE.

See COPYHOLD, No. 2. *See* INFANT DEVISEE, and *Plasket* v. *Beeby*, 264.

1. Devise to the testator's son *H. G.*, and to the issue of his body lawfully begotten, or to be begotten, his, her, and their heirs, equally to be divided, if more than one; and if he shall have no issue of his body living at the time of his decease, remainder to the testator's grandson *H. E.*, in fee: *H. G.* enters, suffers a recovery, and dies without having had any children, having devised to the lessor of the plaintiff in fee: Held, that the recovery, so suffered, barred the remainder over to *H. E.*, whether *H. G.* were tenant for life or in tail. *Doe d. Gilman* v. *Elvey*, *M.* 44 *Geo.* III. 94

2. A testator, after devising 4000l. stock, in the four per cents. to *B.* for life, and after her death to his, the testator's sister's children, equally to be divided, bequeaths to the same children "an additional sum of 2000l. more, to be paid out of his 4l. per cent. consolidated Bank annuities; and in case of the death of any of them before attaining their respective ages of twenty-one years, then to be equally divided among the survivors, share and share alike:" Held, this is a devise of 2000l. money and not stock. *Dean* v. *Test*, *in Canc.* 112

3. A testator expresses his intention of disposing of his estate, real and personal, and devises freehold estates at *A.* to *E. S.*— And to *M. S.* a manor and farm at *L.* and lands and tenements at *S.* and at *S. G.* "which two last are freehold," charged with several annuities. The estate at *L.* is leasehold for lives. And, in order that the lives of the estate at *L.* may be kept duly filled up, he gives 400l. for the purpose of renewing on his decease; and directs, that if any life should drop during the life of the annuitants, then if *H.*, son-in-law to *M. S.* will renew, he shall have the full moiety of the said estate, and the remaining moiety, after the decease of *M. S.* to be divided between her sons and daughters; and, if *H.* does not fill up the life, either of them, who shall renew, shall have the full moiety of the said estate, after the annuities charged upon it are paid; and if neither renew, then the lands and tenements at *S.*, and the lands and tenements at *S. G.* to be sold, and a renewal made with the purchase-money; and if the said *M. S.* and *H.*, or whoever shall be in possession of the said estate, shall pay 400l. to *A. W.* the annuity chargeable to her of 25l. (one of those charged on the freehold also) shall cease: Held, that the grammatical construction of the will must prevail, and *H.* upon renewal is not entitled to the full moiety of the freehold lands, but only of the leasehold estates at *L.* *Right d. Heird* v. *Saunders*, *H.* 44 *Geo.* III. 135

4. A residuary devise of all the testater's lands, goods, and chattels, stock in trade, "so that the devisee shall sell his stock in trade, and household goods; and if these will not pay, she shall next sell the house in fee, in Penzance, and not Prospidnack; so that she shall pay all lawful debts: Held, to give an estate in fee. The direction to sell is merely discretionary. *Goodtitle dem. Paddy and Others* v. *Maddern and Others*, *H.* 44 *Geo.* III. 185

5. A testator, after several bequests of personalty, and also after devising certain lands to

G. S. devises as follows: Also, I give and bequeath unto the said *G. S.* and *Sarah* his wife, all that my messuage, &c. at *B.*; also, all that my messuage, &c. in *W.*; also, all and singular my goods, chattels, rights, credits, ready money, and personal estate, of what nature and kind soever as I shall die seised and possessed of, interested in, and entitled unto, after having thereout first paid and discharged all my just debts and funeral expences. Also, subject to the payment thereout, all the aforesaid legacies; and I nominate the said *G. S.* to be sole executor, whom I charge with the payment of all my just debts, funeral expences, and legacies:" Held, that by virtue of the personal charge, for payment of debts, &c. on *G. S.* in the latter clause of the devise, he took an estate in fee in the messuages, &c. in *B.* and *W.* *Doe dem. Stevens and Others* v. *Snelling*, *E. Geo.* III. 313

6. A tenant of customary tenements, held by copy of court-roll, in the manor of *Wakefield*, in the county of *York*, of two sorts, the one for which a fine certain by ancient custom is paid, and therefore called compounded; the other, for which a fine arbitrary is paid, and which is called uncompounded, surrenders to the use of his will "All and singular the messuages, &c. in the manor of *W.* being of the yearly rent to the lord in the whole of 4*l.* 10*s.* 8½*d.* and compounded for; the rent to the lord in fact not amounting to 4*l.* 10*s.* 8½*d.* for the uncompounded tenements alone: Held, that notwithstanding this mistake the compounded lands, only, pass by the surrender. He afterwards, by his last will, charges all his real estate in the counties of *York*, *Nottingham*, and *Lincoln*, with two annuities and "as to all his freehold manors, messuages, lands, &c. in the counties of *York*, *Nottingham*, and *Lincoln*, and elsewhere, in *Great Britain*, subject as to the said premises in the counties of *York*, *Nottingham*, and *Lincoln*, to the said two annuities, devises them to his first and other sons in strict settlement successively, with divers remainders over: Remainder "of all his said manors, messuages, lands, tenements, and hereditaments, in the said county of *York*, to his eldest daughter for life; remainder to her first and other sons, &c. remainder to his two other daughters successively in like manner; and "as to all his manors, lands, and hereditaments, in the counties of *Nottingham*, and *Lincoln*;" remainder to his three daughters and their heirs in common: And "as to all other his manors, messuages, lands, tenements, and hereditaments whatsoever and wheresoever, either freehold or copyhold, except those in the said counties of *York*, *Lincoln*, and *Nottingham*, which he had already so disposed of by his will as aforesaid," subject to the said rent charges, and also to legacies in aid of the personalty, he devised the same in failure of issue male of his eldest son and of his own body, to his three daughters and their heirs in common. The customary tenements in *Wakefield*, in the county of *York*, though held by copy of court-roll, were not stated to be at the will of the lord, and the tenants of estates of inheritance therein were entitled to the coal, mineral, and trees, &c. therein; but by a decree in the duchy court of *Lancaster*, in the reign of *James* I. confirmed by act of parliament, the tenements of the said manor were decreed to be copyhold tenements, held according to the custom of the manor; but not stating at the will of the lord or as parcel of the manor, though in the same pleading, it was confessed by the tenants, that they were parcel of the manor: Held, that these customary tenements did not pass to the eldest daughter under the first remainder of the freehold lands in York, &c. either by the express words of

that devise, or by implication from the exception contained in the residuary clause to the testator's three daughters, &c. whether they are customary freeholds, held by copy of court-roll, or copyholds strictly, and parcel of the manor. The word "freehold," in the above devise, must be construed according to its ordinary import, and would therefore not include frank tenements held by copy. *Doe dem. Conolly* v. *Vernon*, *E.* 44 *Geo.* III. 318

7. A testator devised to three trustees, and the survivor, and the executors of such survivor, messuages, &c. and all arrears of rent, and a bond of one of the tenants for securing such arrears, in trust, that they, out of the rents and profits, should pay certain annuities for lives, and after payment of the annuities, should pay to his brother 800l. And from and after payment of the said annuities, and the said sum of 800l. he devised the same to his son *William* for life, remainder over, for the lives of other persons; remainder to *C. W.* and his heirs male; remainder to his own right heirs. And he gave to the executors, and the survivor, and the executors of such survivor, power to grant building leases, and he gave to two of the executors 10l. per annum, a-piece, for so long as they should act in the trusts. Held, that the trustees took only a chattel interest during the lives of the annuitants, and until the 800l. was raised, and that those purposes being satisfied, and the devisees for life being dead, the legal estate became vested in *C. W.* the remainder-man in tail. *Doe dem. White* v. *Simpson*, *E.* 44 *Geo.* III. 383

8. *A.* devised certain lands, after the decease of a tenant for life, "to *T. S.* for life, and, after him, to his eldest or any other son, after him, during his natural life, and after them to as many of his descendants, issue male, as should be heirs of his and their bodies, down to the tenth generation, during their natural lives:" Held, that *T. S.* took an estate for life, with several remainders in tail to his sons. *T. S.* becoming a bankrupt, the estate was sold by auction, the purchaser agreeing to pay for the same at Easter, 1803, on having a good title, the conveyances to be at his own expence: Held, that the above title appearing on the abstract delivered, and no other being shewn, till after an action brought by the purchaser, for the deposit-money had and received, the purchaser might recover, in such action, without tendering a conveyance, notwithstanding that, in fact, the bankrupt, being heir general of the testator, and having no sons, his assignees might afterwards proceed in equity to compel a specific performance of the agreement. *Seaward* v. *Willock*, *E.* 44 *Geo.* III. 390

DISCHARGE and SATISFACTION.
See ACTION, No. 5. INDICTMENT, No. 1.

DISTRINGAS.
See PRACTICE.

DISCOVERY, *Bill for*.
See PRACTICE IN CHANCERY, No. 4.

DOCKET.
See BANKRUPT, 4.

DOCKS, WEST-INDIA.
See ACTION, 2.

EJECTMENT.
See DEVISE, 7. PLEADING, PRACTICE, &c.

ELECTION.
See CORPORATION.

ENEMY'S PROPERTY, INSURANCE ON.
See INSURANCE.

EMBARGO.
See INSURANCE,

Beale v. *Thomson*, *H.* 44. *Geo.* III. 144
S. P. in *Johnson* v. *Broderick*, *ib.*

ESCAPE.
See ACTION, 9.

ESTATE, legal Estate.
See DEVISE, (7.) &c. COPYHOLD, 2. EJECTMENT, &c.

ESTOPPEL.
See BANKRUPT, No. 2, and *Tappenden and Others* v. *Burgess*, *M.* 44, *Geo.* III. 34
See PLEADING, No. 6, or *Hall* v. *Cazenove* 272

EVIDENCE.
See CONSPIRACY, STAT. OF FRAUDS, TITLE, &c.

1. In assumpsit against a surviving partner, the administrator, brother and next of kin of the deceased partner, is a good witness, for the plaintiff, to prove the contract. *Burton* v. *Burchall*, *H.* 44 *Geo.* III. 197

2. *See* PERJURY, or *Rex* v. *Boston* 202

3. In debt on bond, with a profert, the plaintiff must produce the bond at the trial, or be non-suited, notwithstanding it is in the hands of the defendant, and he, upon notice to produce it, neglects or refuses to do so. If it be lost out of the plaintiff's possession after declaring, he must amend his declaration, by declaring as on a lost bond. *Smith* v. *Woodward*, *H.* 44 *Geo.* III. 212

4. *Semble.* The jury cannot give credit to part of the testimony of a *single* witness, and reject part. *Madge*, *Executor of Thomas* v. *Fear*, *T.* 44 *Geo.* III. 409

5. Evidence of settlement, *see* SETTLEMENT by birth, &c.

EXCEPTION,
See COPYHOLD, No. 1.
GRANT, No. 1.

EXECUTION.
See PRACTICE, No. 3, 8, 9.
See SEQUESTRATION, and *Payne* v. *Drew*, *H.* 44 *Geo.* III. 170

EXECUTORS, *Action by.*
See ASSUMPSIT, 5. PLEADING, 4.

EXECUTOR DE SON TORT.

1. *A.* a creditor of *B.* having sold goods to him in his life-time, obtains them back again from his wife, after his decease, in part satisfaction of his debt, and before administration granted; *C.*, another creditor, takes out administration, and brings trover for the goods against *A.*: Held, that this single act of the wife does not make her executrix *de son tort*, so as to convey a title to the goods to *A.* although she may be charged as executrix in an action against her. *Mountford* v. *Gibson*, *H.* 44 *Geo.* III. 129

EXECUTOR *carrying on Trade after his Testator's Death.*
See BANKRUPT, 5.

ERROR, *Writ of.*
See PRACTICE, 8, 9.

FALSE RETURN.
See SEQUESTRATION.

FORBEARANCE.
See ASSUMPSIT, No. 1, or *Jones* v. *Ashburnham*, 188

FOREIGNER.
See PRACTICE, 10.

FOREIGN SENTENCE.
See INSURANCE.

FORFEITURE.
See COPYHOLD, No. 1.

FORGERY.

FRAUD.
See AGREEMENT, 3, or *Leicester and Another* v. *Rose* 41

FRAUDS, STATUTE OF.
See BANKRUPT, or *Shaw and Another* v. *Jackman*, *M.* 44 *Geo.* III. 41

See AGREEMENT (5) or 233
Ibid, (7), or 299
And *see Bartlett* v. *Pickersgill*, *T.* 32 and 33 *Geo.* II. *in Canc.* cited in *R.* v. *Roston* 202

FREEHOLD.

See DEVISE, 7.

FREIGHT.

See DEED, No. 1, or *Hall* v. *Cazenove* 272

FREIGHT *pro rata itineris.*

See ASSUMPSIT, 8.

GAMING, MONEY WON AT, *of Bill* for discovery therof. *See* PRACTICE in CHANCERY, 4.

GRANT.

1. A mortgagor, and mortgagee of manors, &c. in fee, convey the same and all the estate, &c. by lease and release, to a purchaser: in the conveyance is contained a covenant from the purchaser, that the mortgagor, his heirs and assigns, may enter and dig for coal, and other mineral, and take the same to their own use: Held, that this is only a liberty, and the heirs of the mortgagor cannot bring trover against the tenants of the land for coal dug there, under a lease of the coals from the owner of the soil. Also, that it is not a reservation or exception by the mortgagor, out of his estate, for at the time of making the conveyance, he had only the equity of redemption, and no legal estate out of which to make such reservation. *Cheetham* v. *Williamson and Others*, *H.* 44 *Geo.* III. 278

GUARDIAN.

1. A conveyance by a ward to her guardian of a rectory, in consideration of esteem and friendship, and for his care during minority, though executed after attaining 21, decreed to be fraudulent, upon the general principle of the court, not to permit such transactions between persons bearing such relations to each other. *Hatch* v. *Hatch in Canc.* 226

HABEAS CORPUS AD TESTIFICANDUM.

See *in re Sir Edward Price, a Prisoner*, *H.* 44 *Geo.* III. 284

HABEAS CORPUS.

1. Habeas Corpus. Application to take a child born in this country out of the custody of the father, on the ground that he was an alien, and liable to be sent out of the country under the provisions of the alien act. The court refused the application, on the ground that there was no evidence that the child was in danger of being ill treated, or that the father intended to take the child out of the country, and that he had *primâ facie* the legal right to the custody of the child. *Rex* v. *de Manneville*. 358
See ACTION, 9, or *Wigley* v. *Jones*, *T.* 44 *Geo.* III. 457

HIGHWAYS.

As to costs on presentment, and attachment for not repairing the same, see *Rex* v. *the Inhabitants of New Windsor*, 168

INDICTMENT.

See INFORMATION.

1. To trespass, for assault and false imprisonment, the defendants pleaded a commitment of the plaintiff by them as justices, for want of sureties until the next sessions, for a misdemeanor on the stat. 1 *W.* & *M.* c. 18, s. 18, giving a penalty of 50l. to the crown; and before the session, the prosecutor, with the consent of the defendants, agreed to the discharge of the plaintiff; and thereupon, at the sessions, he was discharged by the court, and accepted such discharge, in

satisfaction of the assault and false imprisonment: Held, bad on demurrer. For the making up a prosecution, for a public misdemeanor, is illegal, and no satisfaction; and if there was any satisfaction, it moved from the prosecutor, and not from the defendants. *Edgcumbe* v. *Rod, T.* 44 *Geo.* III. 515

2. Indictment on statute 11 *Geo.* I. c. 4, s. 6, against a bailiff of a corporation, for not attending at the election of a new bailiff: Held, that as he was not one of the electors of the new bailiff, under the charter, his absence could not impede or hinder the election, and he, therefore, was not within the statute; the statute does not make the attendance of the mayor, bailiff, or chief officer necessary, where it is not so by the charter. *Rex* v. *Corry, T.* 44 *Geo.* III. 538

INFANT *employing an Attorney.* *See* PRACTICE IN CHANCERY, No. 2.

INFANT DEVISEE.

1. An infant devisee being sued on a bond of the testator, cannot claim the privilege that the *parol* shall demur till such devisee come of age. That privilege is a relict of the feudal institutions, and not being extended to the devisee expressly by 3 & 4 W. and M. c. 14. is not to be extended by implication; for, with the abolition of the old tenures, the reason for it is gone, and the object of the statute was not to benefit the devisee but to relieve specialty creditors. *Plasket* v. *Beeby, H.* 44 *Geo.* III. 264

INFORMATION.

See PLEADING, 19. *Rex* v. *Stevens, T.* 44 *Geo.* III.

INSOLVENT.

See AGREEMENT, No. 3. and *Leicester* v. *Rose,* 41

One of two insolvents discharged under the Lords act, see PRACTICE, No. 14. And see notes of points determined on the insolvent act, 44 *Geo.* III. c. 108. at the end of our abstract of that act, p. 166, of ABSTRACTS *of the* ACTS *passed* in the 44 year of King *Geo.* III.

INSURANCE.

1. On an insurance, by a British underwriter, during peace, against capture, &c. in general terms on a foreign ship, which is afterwards captured by one of his majesty's ships of war, upon hostilities breaking out between the two countries, the assured cannot recover for the loss even after peace is restored. The general terms, arrests of princes, must be understood with an exception of the nation to which the underwriter belongs. On a policy at 25 guineas per cent. to return 3l. per cent. if the ship sails from Cadiz with convoy for England, and 2l. per cent. more for convoy from England to Flushing, or 10l. per cent. if with convoy for the voyage, and arrived, no part of the premium is returnable in case the ship be lost; for the words, *and arrived,* mean arrived at the ultimate terminus of the voyage. *Kelner* v. *Le Mesurier, M.* 44 *Geo.* III. 72

2. Insurance on a French ship in time of peace; war is declared, and she is captured by a British force; the agents for the assured obtain the royal licence to receive the money for the loss from the underwriters, and upon the arrival of peace an action is commenced upon the policy under their authority: Held, not maintainable. *Gamba* and Another v. *Le Mesurier, M.* 44 *Geo.* III. 81

3. Goods are shipped on board an American by a merchant in London, during peace, to a French merchant at Bayonne; before she quits Gravesend war is declared; the goods are afterwards seized as prize by the Spanish government, in alliance with Great Britain:

Held, that an underwriter on a policy of insurance on these goods, effected before the war, and averring the interest in the French merchant, is not liable for the loss accruing during the war. All policies of insurance on foreign interests are to be understood with a proviso, that they shall not extend to cover any loss occurring in the course of a war between the two nations, to which the assured and insurer respectively belong. *Brandon* v. *Curling*, *M.* 44 *Geo.* III. 85

4. It is not necessary that an assured should communicate to the insurer circumstances relating to the sea-worthiness of the ship (unless particularly required, in which case concealment is fraud) because that is covered by the implied warranty. The correct rule is to communicate all which materially varies the object of the voyage, or the nature of the risk. Therefore, where a ship had been surveyed in the West Indies, in order to satisfy the freighters that she was sufficient to take in a cargo and proceed to Great Britain (she having got a bad character) this was held not necessary to be communicated; although evidence was given that if it had been known it would have excited suspicion, and the underwriters would have made further inquiries concerning the ship. As to all circumstances which operate only as prudential motives for the insurer undertaking the risk or not, but which do not vary the object of the policy or the nature of the risk, such as the built of the ship, her age, her repairs, &c. they should be specifically inquired into by the insurer before he takes the risk upon him. *Heyward* v. *Rogers*, *H.* 44 *Geo.* III. 289

5. A sentence of a foreign court, after reciting that having seen the verbal process of the capture of the ship, carrying Danish colours, and having, examined the papers, and considering that the ship's built was not known, and that the transfer thereof to a neutral subject was made since the war, and that the mate and three officers were naturalized subjects, only since the war, decreed the vessel to be good prize according to the ordinances of 1744, which require some document to be produced of the transfer of a ship, being enemy's built, before the war, and that the owners or masters shall be naturalized subjects of a neutral power before the war, and direct that all foreign vessels shall be good prize when the merchant, supercargo, clerk, or marine officer on board, shall be an enemy's subject: Held, this is conclusive that the ship is not neutral under a warranty that the ship is Danish. *Bolton* v. *Gladstone*, *E.* 44 *Geo.* III. 372

6. Of INSURANCE made by an agent under power of attorney, *see Agent*, or *Mason* v. *Joseph*, *T.* 44 *Geo.* III. 407

7. A passport expressed to be granted to George Dominick, master or commander of the ship called the Mount Vernon, of the town of Philadelphia, of the burthen of 424 tons, or thereabouts, being at present in the port of Philadelphia, does not contain a description of the habitation of the master under the 23th article of the treaty between France and America, which it is necessary to have on board, to entitle the ship to all the privileges of an American neutral ship. For, the words, "of the town of Philadelphia," apply to the ship, and not to the master. Q. What is the true form of the passport annexed to the treaty? *Baring* v. *Christie*, *T.* 44 *Geo.* III. 462

JUDGMENT *joint and one defendant discharged.* *See* PRACTICE, 14.

JURY, *see* EVIDENCE, No. 7.

JURY, CHALLENGE OF. *See* TRIAL, NEW.

JUSTICE OF THE PEACE, *Warrant of*
See TRESPASS.

JUSTIFICATION *under* WARRANT.
See TRESPASS.

LANDLORD and TENANT.
See TENURE.

1. A tenant of a farm entitled to the way-going crop of the harvest 1801, after his term expired, and paying rent up to the Lady-day preceding; previous to that day, viz. in June, 1800, agrees to let in the new tenant, and sells standing crops, and takes a receipt for the value thereof, and also for 20l. "for the right of cropping the lands from June 18th:" Held, that, by this sale of the right of cropping, the tenancy is not to be considered as changed, and the outgoing tenant must pay the rent for the time from Lady-day, 1800, to Lady-day, 1801. The outgoing tenant had paid tithes and poor's rate for that time. *Petrie* v. *Daniel*, 196

See COPYHOLD, No. 1. *Doe dem Nunn* v. *Luffkin*, *M.* 44 *Geo.* III. 90.

LATITAT *irregular*.
See PRACTICE, 5.

LEASE.
See COPYHOLD, No. 1.

LICENCE.
See GRANT, No. 1.

LIEN.
See RESPONDENTIA, No. 1.

LIMITATIONS, STAT. OF.

1. A bare acknowledgment of a debt within six years is sufficient to take the case out of the statute of limitations in assumpsit. *Semble*. It is so even where the acknowledgment of the debt does not raise, or actually rebuts any inference of a promise to pay. *Bryan* v. *Horseman*, *H.* 44. *Geo.* III. 125

LONDON, COURT OF CONSCIENCE.

1. The statute 39 & 40 *Geo.* III. c. 104, s. 5, (Public local acts) called the London Court of Conscience Act, does not apply 'to persons' merely on account of 'seeking a livelihood' therein, unless they reside there, or do it in some open way, or seek their livelihood there substantially. An attorney, therefore, who has no office or residence in the city, is not within the act, and may be sued in the superior courts. *Gould* v. *Collyer*, *E.* 44 *Geo.* III. 334

2. Assumpsit for the single value of tithes is not a matter "concerning or properly belonging to the ecclesiastical court," under the exception in the 11th section of the 39 & 40 *Geo.* III. c. 104, so as to oust the court of requests, in London, of its jurisdiction, where the amount of the demand does not exceed 5l. and therefore, if the plaintiff sue in the court of king's bench for the same, the defendant, after verdict, will be permitted to enter a suggestion upon the roll to bar him of his costs. *Sandby, Clerk*, v. *Miller*, *E.* 44 *Geo.* III. 396

LORD'S ACT.
See PRACTICE, No. 14.

MACE, SERJEANT AT.
See PLEADING, No. 10.

MARGINAL *Notes of Points for the* JUDGES.
See PRACTICE, No. 13.

MARINER.
See MASTER and MARINER.

MARRIAGE ARTICLES.
See BANKRUPT, No. 1, and *Shaw* v. *Jackman*, *M.* 44 *Geo.* III. 14

MARSHALL OF THE K. B. PRISON.
See ACTION, 9.

MASTER and MARINER.

1. A seaman, detained in Russia under the late embargo, in 1800, who is permitted by the captain to return, and serve on board upon the embargo being taken off, is entitled to wages during the time he was on shore and absent from the ship by force thereof; his contract being for the voyage, and to do his best endeavour for the ship, and not to neglect or to refuse to do his duty by day or night, nor go out of the ship on board any other vessel, nor be on shore under any pretence without leave, under the penalties of 2 *Geo.* II. c. 36, and 37 *Geo.* III. c. 73; and twenty-four hours absence, without leave, to be deemed a total desertion. Capture, even hostile, does not defeat the right to wages, where the captors, instead of proceeding to condemnation, release the ship, and thereby pronounce that their act is not a valid seizure. *Beale* v. *Thompson, H.* 44 *Geo.* III. 144

MASTER and SERVANT.
See WARRANTY and SETTLEMENT.

MONEY. *Devise of Stock or Money.*
See DEVISE, No. 2.

MORTGAGOR and MORTGAGEE.
See COPYHOLD, 2.

1. Appeal from a decree pronounced by Lord *Alvanley*, when Master of the Rolls. An assignee of a mortgage, in general cases, takes it entirely at his own risk as to what is due from the mortgagor to the mortgagee, but if the mortgagor makes no objection to the demand for a length of time, and deals with the assignee of the mortgagee without objecting to the account of the original mortgagee, he cannot have a decree to surcharge and falsify against that assignee, but must resort for redress to the original mortgagee. Accounts settled and signed, cannot be falsified except for error: but if error be manifest, the court will correct it, notwithstanding any stipulation between the parties. Error must be specifically charged in the bill, and proved; otherwise the Court will not open an account. A mortgagee cannot have profit, by way of commission, for receiving the produce of the mortgaged estate. A trustee or agent is not entitled to commission unless he remains upon the spot, and attends to the management of the estate. *Chambers and wife* v. *Goldwin in Canc.* 252

NAVY.
See PRIZE.

NOTICE TO QUIT.
See LANDLORD and TENANT.

NOTICE BY CARRIER.
See CARRIER.

OFFICER.
See CORPORATION, 1. INDICTMENT, 2.

OVERSEER.
See ASSUMPSIT, 2, and POOR.

PARENTS and CHILDREN.
See HABEAS CORPUS.

PAROL DEMURRER.
See INFANT DEVISEE, or *Plaskett* v. *Beeby, H.* 44 *Geo.* III. 264

PARTNERS.
See ACTION, 4.

PAUPER.
See SETTLEMENT.

PAYMENT.
See ANNUITY, *as to the hand by whom money paid.*
Of MONEY into COURT, *see* PRACTICE, 10.
JOINT or SEVERAL PAYMENT, *see* ACTION, No. 4.

PENAL ACTION.

See COALS. PRACTICE, No. 17. PRACTICE in Chancery, No. 4.
PEREMPTORY PAPER 198

PERFORMANCE.

See PLEADING, 9.
Performance specific, *see* AGREEMENT, 5. 233

PERJURY.

1. Pending an action at law the defendant files a bill against the plaintiff for a discovery of monies paid to him, praying also an injunction, which being obtained, is afterwards dissolved, upon the answer denying those payments. The plaintiff in equity then prosecutes an indictment against the plaintiff at law for perjury in his answer: Held, that the prosecutor is a good witness to prove the perjury, for he cannot make use of the conviction to his own advantage, either in the action at law or in the suit in equity. *Rex* v. *Boston*, *H.* 44 *Geo.* III. 202

PLATE.

1. The act of selling a single piece of plate exceeding five penny-weights, does not constitute a trader within the stat. 31 *Geo.* II. c. 3, s. 6, so as to subject the party to a penalty for not taking out a licence. *The King* v. *Buckle*, *M.* 44 *Geo.* III. 49

PLEA, *Demand of.*

See PRACTICE, 6.

PLEADING.

1. To debt on bond, the defendants in their plea set out the condition for the performance of an agreement for building a house, &c. reciting the same in part, viz. that one of the defendants had covenanted to build, conformable to certain plans, signed by the plaintiff and the said defendant, and deposited with the plaintiff conformably to the particulars of the building to the said agreement annexed, amongst which particulars, &c.; and also referring to other terms in the agreement particularly set forth, by which it plainly appears, that the whole is not set out in the condition; the defendants then plead performance generally, to which the plaintiff demurs specially: Held, the plea is bad, for the deed ought to have been set out, that the court might see whether there were any negative or disjunctive covenants. Query, whether it might not have been sufficient for the defendants to have averred, that there were no negative or disjunctive covenants in the agreement. *The Earl of Kerry* v. *Baxter*, *M.* 44 *Geo.* III. 106

2. On an insurance, by a British underwriter, during peace, against capture, &c. in general terms on a foreign ship, which is afterwards captured by one of his majesty's ships of war, upon hostilities breaking out between the two countries, the assured cannot recover for the loss even after peace is restored. The general terms, arrests of princes, must be understood with an exception of the nation to which the underwriter belongs. On a policy at 25 guineas per cent. to return 8l. per cent. if the ship sailed from Cadiz with convoy for England, and 2l. per cent. more for convoy from England to Flushing, or 10l. per cent. if with convoy for the voyage, and arrived, no part of the premium is returnable in case the ship be lost; for the words, and arrived, mean arrived at the ultimate *terminus* of the voyage. *Kelner* v. *Le Mesurier*, *M.* 44 *Geo.* III. 72

3. *See Appleton* v. *Binks*, *E.* 44 *Geo.* III. 361

4. Assumpsit by executors containing two sets of counts, one upon promises made with the testator: the other stating that the defendant being indebted

to the testator for goods sold, after his death, promised to the plaintiff, executor, and executrix, as aforesaid, to pay, &c.; also, that the defendant accounted with the plaintiffs as executrix and executors as aforesaid, concerning money due to the plaintiff, executrix and executors, as aforesaid, and being thereupon found indebted to the plaintiffs, executrix and executors as aforesaid, promised to pay them, executor and executrix, as aforesaid: also, containing a count for interest due to the plaintiffs as executrix and executors: Held, on error, that the count on an account stated, could not be joined with the counts for goods sold, &c. Q. whether a count upon promises with one as executor, can be joined with others on promises with the testator. *Henshall* v. *Roberts*, *E.* 4 *Geo.* III. 375

5. Assumpsit, for that *S. F. B.* deceased, being indebted to the plaintiff at the time of his death, *N.* the wife of the defendant, before her intermarriage, in consideration thereof, and in consideration that the plaintiff, at her request, would forbear and give day of payment of the said debt, undertook, &c.: Held ill on special demurrer, for not stating either that *N.* or any other person was liable to be sued. A general forbearance, like the forbearance of an individual, is not a good consideration, unless there is somebody to be forborne. *Jones* v. *Ashburnham and Wife*, *H.* 44 *Geo.* III. 188

6. A charter-party, purporting to be indented, made, and concluded, the 6th day of February, whereby it is agreed that the ship shall proceed from *Deptford*, on a voyage to *Demarara*, on or before the 12th of the same month, and by which the owner covenants that she shall proceed on her intended voyage on the day before mentioned, is actually executed by both parties on a day subsequent, viz. the 15th of March following, while the ship is still lying in the river. The ship sails after the 12th of February, and perform her voyage. The owner brings covenant for the freight, averring that the charter-party was indented, made, and concluded, after the day of the date, and after the 12th of February, and averring performance of all which on his part was possible to be performed: Held, upon special demurrer, that the plaintiff was not estopped from alleging that the deed was indented, made, and concluded, after the day it bears date. Concluded implies delivery of the deed. *Semble.* The covenant that the ship should sail before the 12th is not a condition precedent, but rather an independant covenant. Held also, that if it be a condition precedent in terms, yet it having become impossible at the time of making the deed, within the knowledge of both parties, it is no part of the real contract between them, and the plaintiff having performed the voyage, which is the substance of the contract, is entitled to his freight. *Hall* v. *Cazenove*, *H.* 44 *Geo.* III. 272

7. In debt on bond, with a profert, the plaintiff must produce the bond at the trial or be non-suited, notwithstanding it is in the hands of the defendant, and he, upon notice to produce it, neglects or refuses to do so. If it be lost out of the plaintiff's possession after declaring, he must amend his declaration, by declaring as on a lost bond. *Smith* v. *Woodward*, *H.* 44 *Geo.* III. 212

8. Affidavit of debt against two defendants for a joint and separate debt; *latitat* against both; declaration against one only: Held irregular, and the declaration and subsequent proceedings set aside. *Lewin* v. *Smith*, *H.* 44 *Geo.* III. 285

9. An indictment stated that a

writ to arrest one *B. W.* issuing out of the weekly court of record of the town and county of the town of *Poole*, directed to one *T. B.* serjeant at mace of the said county and county of the town of *Poole*, was delivered to him to be executed, but did not state that *T. B.* was an officer for the execution of writs, or an officer of the court, and stated, that he having arrested the said *B. W.* one *T. S. O.*, &c. did make an assault on the said *T. B.* in the execution of his office, and rescued the prisoner: Held, in arrest of judgment, that a serjeant at mace, is not *ex vi termini* an officer for the execution of writs, and his authority does not sufficiently appear on the indictment, wherefore the rescue appears to be lawful, being in defence of liberty. *Rex* v. *Osmer*, *T.* 44 *Geo.* III. 555

10. *Semble*, If a demandant in a writ of right, count upon the seisin of his ancestor in his demesne, as of fee, omitting and of right, it is bad. Held on error, both by the Court of Common Pleas, and this Court, that if the demandant, in deducing his title through a female, describes her as sister and heir of *T. G.* and it appears upon the face of the count, that *T. G.* left a son *W. G.* who survived his aunt, it is fatal, because she could not be heir of *T. G.*; although it also appears, that upon failure of issue of *W. G.* the issue of the sister of *T. G.* became his heirs. *Dowland* v. *Slade*, *T.* 44 *Geo.* III. 543

11. ACTION JOINT, *where the payment is joint out of which the assumpsit arises*, *see* ACTION, No. 4, or *Osborn* v. *Harpur*, *T.* 44 *Geo.* III. 411

12. DISCHARGE and SATISFACTION, not by less sum in satisfaction of a greater, without any thing else, *see* ACTION, No. 5, or *Fetil* v. *Sutton*, *T.* 44 *Geo.* III. 415

13. To found an action against the vendor of coals, not having obtained a coal-meter's ticket, for a penalty of 50l. on the 19th *Geo.* II. c. 35, s. 11. the plaintiff need not proceed to convict the offenders before a justice of the peace, though that clause of the act contains the words "being thereof convicted by the oath of two credible witnesses before one or more justices," &c. For by the 21st clause, which enacts, that all penalties above 5l. shall be recovered by action in the superior courts, those words must be taken to apply only to the case of the 5l. penalty upon the carter, imposed by the same 11th clause. *Semble*. A coal waggon is within the clause, though the act contains only the words cart or carts *Peto q. t.* v. *Hague*, *T.* 44 *Geo.* III. 417

14. Of PLEADINGS in Actions for accepting Stock, *see* STOCK-JOBBING.

15. Of pleading in covenant by a *feme sole*, for not performing *award* made after she becomes covert, *see* ACTION, No. 8.

16. The word until, in an indictment, may be inclusive of the day or *terminus ad quem*, if the context require it to be so understood. *Semble*. *The King* v. *Inhabitants of Gamlingay*, 3 *T. Rep.* 513. is over-ruled, so far as it decides the context cannot explain the meaning of the word *from* to be inclusive. *Rex* v. *Stevens and Agnew*, *T.* 44 *Geo.* III. 437

17. Of *prout patet per recordum*, applied to that, which is only *quasi* a record, *see* ACTION, 9.

18. Of trover by 3 assignees of a bankrupt, where a 4th has been removed, and no re-assignment made, *see* BANKRUPT, No. 7.

POOR, RELIEF and REMOVAL.

See SETTLEMENT. ASSUMPSIT, 2.

PRACTICE.

See AMENDMENT. COSTS. BAIL-BOND. *See* BAIL, and also *Grant* v. *Fagan*, *M.* 44 *Geo.* III. 12

See BAIL, DEPOSIT *in lieu of*, and *Nunn* v. *Powell*, *M.* 44 *Geo.* III. 13

See ABATEMENT, *Lang* v. *Comber*, *M.* 44 *Geo.* III. 108

1. Action for penalties for bribery: *venue* laid in *York*: Motion to change the *venue* to *Hull*, the plaintiff having some causes of action which arose in *Hull*, but being out of time to sue in a new action, and it having been his intention originally to proceed for the offences in *Hull*; Held, that the *venue* may be changed in a penal action, where the statute of limitations has run, notwithstanding other causes of action in another county, which are still within time, but which the plaintiff agrees to abandon. *Dover* v. *Maestaers*, *H.* 44 *Geo.* III. 123

2. PEREMPTORY PAPER, Motions for new trials 198

3. ENLARGED RULES, not served 197

4. Interlocutory judgment being obtained in assumpsit against a feme sole, final judgment may be entered, and a ca. sa. may issue against her as a feme sole, although she marry before the suing out of the ca. sa. *Cooper* v. *Hunchin*, *H.* 44 *Geo.* III. 282

5. Affidavit of debt against two defendants for a joint and separate debt; *latitat* against both; declaration against one only: Held irregular, and the declaration and subsequent proceedings set aside. *Lewin* v. *Smith*, *H.* 44 *Geo.* III. 285

6. It is not necessary to demand a plea where the defendant has taken out a summons for time to plead. *Pearson* v. *Reynolds*, *H.* 44 *Geo.* III. 288

7. Where a writ is delivered to the late sheriff, and executed by him, and the return to the writ happens in the time of a new sheriff, the new sheriff must return it with the late sheriff's return indorsed thereon, in order to the Court's, proceeding to enforce obedience to the writ; but if the new sheriff return *cepi corpus* by mistake, and an attachment afterwards issue against the late sheriff for not bringing in the body, this is irregular, as the Court can only look to him who made the return. But where the rule to bring in the body was had the 12th of November, and no objection made to the attachment till the 27th of January following, it was held that the party came too late. *Rex* v. *Sheriff of Middlesex*, *H.* 44 *Geo.* III. 286

8. To sue out execution, pending a writ of error for delay, the party must state positively an admission that it was brought solely for delay. It is not sufficient to shew that the defendant meant to harass and delay the plaintiff, unless it appear that he acknowledges he has no ground for his writ of error. *Butterfield q. t.* v. *Windle*, *E.* 44 *Geo.* III. 335

9. A writ of error may be sued out before final judgment is signed and it will be a stay of execution. *Semble.* "Where a writ of error is sued out, and the plaintiff will not sign judgment till after the return of the writ, in order to avoid the effect of it, and then sues out execution, the court will set the execution aside. *Somerville* v. *White*, *E.* 44 *Geo.* III. 336

10. A foreigner having obtained judgment in an action of assumpsit, and the defendant therein having a cross action upon the case pending against the foreigner, for damages accruing out of the same transaction, the court permitted the latter to pay the debt on the former judgment into court, to abide the event of the suit then pending, but to be paid out immediately after the trial, he going to trial immediately — A motion of the first impression. *Pinto* v. *Hutchinson*, *E.* 44 *Geo.* III. 338

11. *Semble.* If a trial be over in the afternoon, and a witness stay in the town till eleven o'clock the next morning, his home being distant only twelve miles, his

subpœna is no protection to him from arrest in the town. *Anonymous, E.* 44 *Geo.* III. 355

12. On motions to set aside awards where there is no cause pending, it is not necessary that the affidavits, on shewing cause, should be entitled with the christian and surnames of the parties, although the rule is generally drawn up with the names of the parties, as if there was a cause pending. *Anonymous, E.* 44 *Geo.* III. 358

13. *Obiter.* The party who demurs should not only state his points, intended to be argued, in the margin of the paper books which he delivers, but should also leave a copy of them with the two other judges. *Appleton* v. *Binks, E.* 44 *Geo.* III. 361

14. If two or more defendants are charged in execution on a joint judgment, the discharge of one of them under the lord's act, not opposed by the plaintiff, is no ground for an application to discharge the other. *Naden* v. *Paten, E.* 44 *Geo.* III. 362

15. Two parties submitted to arbitration by bond, and agreed therein that the submission to the award should be made a rule of court, and afterwards, by a memorandum indorsed on the bond, after the time of making the award had expired, agreed that the time for an umpire to make his umpirage should be extended to a future day, but without expressly mentioning that this new submission should be made a rule of court: Held, that this memorandum was a virtual incorporation of all the terms of the bond not inconsistent therewith, and therefore must be taken as containing an agreement to make the submission a rule of court, under the statute 8 and 9 *W.* III. c. 15. The case of *Jenkins* v. *Law*, 8 *Term Rep.* 87, was over-ruled, upon consultation with the other courts. *Evans* v. *Thompson, E.* 44 *Geo.* III. 380

16. *Semble,* An attorney, who has drawn an agreement between two parties, will be ordered, upon motion to the court, to give over to either of them a copy thereof, to the best of his power, when the same shall be requisite, upon payment of the costs thereof. *Clarke* v. *Terrel, T.* 44 *Geo.* III. 399

17. In three penal actions for bribery by the same plaintiff, against the same defendant, the court refused to consolidate them, there being forty instances of bribery declared upon in each action. In penal actions the court will rather require that the trial of each offence should be separated as much as possible, for the convenience of trial. Where there are actions in this court, and also in another court, between the same parties, this court will not impose terms concerning the actions in this court, in order to compel any thing to be done in the other actions; but application must be made to the court where they are brought. *Benton* v. *Praed, T.* 44 *Geo.* III. 423

18. A bill of Middlesex, returnable on Monday next after the morrow of the holy Trinity, was held irregular; but the rule to set aside the proceedings was enlarged, for the party to amend, upon payment of costs, and also upon specifying the amendment, in the rule *nisi*, notwithstanding the defendant was in custody. *Anonymous, T.* 44 *Geo.* III. 425

19. Where a cause is referred to an arbitrator, and the costs are to abide the event, and the arbitrator awards a specific performance of something to be done, which proves that the event, in fact, is in favour of the plaintiff, he is entitled to costs; although the arbitrator does not award a verdict to be entered in form. As, where in an action of trover for corn the arbitrator, instead of awarding damages and a verdict, awarded that the plaintiff should have a right of entering the defendant's barn, &c.—N. B. It seems, in this case, the costs were

to abide the event of the award, not "the event of the cause." *Anonymous*, T. 44 *Geo.* III. 426

20. Where the rule to return a writ expires in vacation, the sheriff has till the next term to return it. Such a return before the sitting of the court on the 1st day of the subsequent term was held good. Q. Whether he has not three days in that term? *Anonymous*, T. 44 *Geo.* III. 427

21. Where there has been an arrest, and afterwards a payment of money into court, by the defendant, of a less sum than the sum for which he was held to bail, and the plaintiff has taken it out and discontinued, the plaintiff is still entitled to his costs, notwithstanding the act 43 *Geo.* III. c. 46; unless the defendant can shew, *aliunde*, that the plaintiff had no probable cause for arresting him for that amount. *Clarke* v. *Fisher*, T. 44 *Geo.* III. 428

22. *Semble* to entitle the defendant to costs, under 43 *Geo.* III. c. 46, s. 3, where the plaintiff has arrested him for a larger sum than he recovers in the action, it must appear clearly that his intention was malicious, or at least vexatious. *Younie* v. *Mallison*, T. 44 *Geo.* III. 521

23. All affidavits in a cause, excepting affidavits of the cause of action before process sued out, must be entitled with the names of all the parties, and the plaintiffs and defendants, and with their respective christian names. The rule of court need not be so entitled. *Noel and Others* v. ——, T. 44 *Geo.* III. 475

PRACTICE IN CHANCERY.

1. The custody of an examination, taken under a *dedimus* in the country, belongs to the clerk in court, who is entitled to make the copies of it. If sworn in town, it belongs to the master. *Drake* v. *Woodford*, M. 44 *Geo.* III. 116

2. On a motion to review the taxation of a bill of costs commenced during a client's minority, it was granted accordingly, on the ground, that a continued employment when of age, might, under circumstances, amount to an undertaking to pay the prior bill *Guy* v. *Burgess*, M. 44 *Geo.* III. 117

3. A defendant cannot be ordered to produce deeds, &c. unless stated in a schedule to his answer, or at least described with certainty. The practice formerly was to pray a schedule in the bill; and it is so still in Ireland. *Anonymous*, M. 44 *Geo.* III. 117

4. The statutes 9 *Anne*, c. 14, s. 3 and 4, and 18 *Geo.* II. c. 34, s. 3, do not authorise courts of equity to hold cognizance of a bill by a common informer for a discovery of money won at play; for the latter statute empowers the court to proceed to a decree, and a court of equity does not decree a penalty. *Holloway* v. *Shakspeare*, M. 44 *Geo.* III. 121

5. If an answer contains a positive denial to the facts stated in the bill, there cannot be a decree against the defendant upon the evidence of one witness only, unless the facts so preponderate over denial, that greater credit must be given to the witness than to the answer, recollecting that the latter is an interested party. Although the delivery up and cancelling of a charter-party takes away a remedy at law, yet it rather assists a claim for equitable relief. *East India Company* v. *Donald*, H. 44 *Geo.* III. 213

PRESENTMENT ON VIEW OF A MAGISTRATE.

See COSTS, No. 2.

PRISONER.

1. DISCHARGE under the Lord's Act, of one of two prisoners in execution, *see* PRACTICE, 14.

PRIZE.

See Lord Nelson v. *Tucker*, M. 44 *Geo.* III. 111

Lord Keith v. *Pringle*, M. 44 *Geo.* III. 111

1. A court of prize has original jurisdiction over the prize and the proceeds thereof, and may decree interest against any agent or other person in whose hands it may be, if he made interest or profit thereof, as part of the *res*, and, independently of the authority over prize agents given, by the several statutes, to the courts of admiralty. If such agents have not made interest, they should rest their defence upon that point in the prize court below, and this court will not grant prohibition. *Willis* v. *the Commissioners of Appeal in Prize Causes*, *E.* 44 *Geo.* III. 339

PROHIBITION.
See PRIZE.

1. Where the defendant libelled the plaintiff for tithes in the spiritual court; the plaintiff pleaded that the place was extra-parochial; the plaintiff replied an inclosure act, 31 *Geo.* III. c. 91, and insisted that it was thereby annexed to and made part of the parish, whereof he was rector; the spiritual court decreed accordingly, the tithes to be paid to the defendant: Held, upon a declaration in prohibition, that the spiritual court, having misconstrued the statute a prohibition might be granted in this case after sentence; it appearing that the court could no otherwise have decreed the tithes than by misconstruction of the statute. Note. The question suggested by *Buller*, J. in *Home* v. *Camden*, 4 *T. R.* 382. 2 *H. Bl.* 533. whether the misconstruction of a statute is not matter of appeal, and not of prohibition, after sentence, is now settled that it is matter of prohibition. *Gould* v. *Gapper*, clerk, *T.* 44 *Geo.* III. 598

PROCESS.
See EXECUTION, PRACTICE.

QUO WARRANTO.
See CORPORATION.

RIGHT, WRIT OF.
See PLEADING.

RECOVERY.
See DEVISE, No. 1. *Doe d. Gilman* v. *Elvey*, *M.* 44 *Geo.* III. 94
Meaning of the word *Recovery*, in the stat. 43 *Geo.* III. c. 46, s. 3. *See* PRACTICE, No. 21.

REGISTER ACTS.
See SHIP. REGISTER-ACTS. REGULA GENERALIS. *Peremptory Paper. New Trials*, *See* page 198

RELATION.
The relative refers to the last antecedent. *Baring* v. *Christie*, *T.* 44 *Geo.* III. and *see* INSURANCE.

REMAINDER.
See DEVISE, No. 1.

RESPONDENTIA.
1. *B.* advances money to *F.* on *respondentia*; the condition of the bond recites, that the money was advanced on goods on board the ship *Belvedere*: the condition is, that if the ship proceed from the *Thames* on a voyage to any port in the *East Indies*, &c. and from thence return to the river *Thames*, at or before the end of 36 calendar months from the date, and there end her voyage, &c. (the casualties of the seas excepted;) and if within 30 days after her arrival *F.* pay the money, and *respondentia* interest, or if the ship shall be entirely lost in the voyage, and *F.* shall duly account upon oath for the fair average on the goods on board the said ship, then the obligation to be void: Held, that *F.* becoming a bankrupt, *B.*, the obligee, has no lien upon the goods on board the ship, under the form of this obligation. *Busk* v. *Fearon*, *M.* 44 *Geo.* III. 103

RETURN *in Writ irregular*.
See PRACTICE, 18.

REVOCATION of WILL.
See WILL.

REVOCATION of SUBMISSION to arbitration.
See ACTION, No. 8.

RULES, enlarged Rules.
See PRACTICE.

RULE OF COURT, *how entitled.*
See PRACTICE, No. 23.

SAILOR.
See MASTER and MARINER.

SATISFACTION.
See DISCHARGE and SATISFACTION.

SEDUCTION.
See ACTION.

SENTENCE, FOREIGN.
See INSURANCE, 5, 7.

SEQUESTRATION.

1. A commission of sequestration issued out of the court of Chancery, upon a decree directed to certain commissioners, to enter upon all the lands, &c. of *C. S.* and to take into their hands not only the rents, &c. but all his goods, &c. "and detain and keep the same under sequestration till he shall have paid the sum therein mentioned:" subsequent to this, a writ of *fieri facias* against the goods of *C. S.* was delivered to the sheriff to be executed; whereupon he seized the goods, and made an inventory; but he was afterwards told that the goods were under sequestration, and returned *nulla bona:* The plaintiff in the writ of *fieri facias*, brought an action for a false return, and upon a case reserved, without any fraud being found by the jury, and on admission that the sequestrators had not taken possession of the goods, and that the sequestration had not been laid on previous to the return of the *fieri facias:* Held, that the sheriff was bound to levy the goods; for although, upon application to this court, or to the Court of Chancery, the sheriff might have been relieved, at the time of executing the writ, if there were any difficulty; yet it does not appear that the Court of Chancery would have proceeded against him for a contempt, in disregarding a sequestration which had not been laid on. *Semble*, It is rather a contempt in the sequestrators not to enforce the commission directed to them. *Semble*, A sequestration after decree can at most be considered equivalent to a common law execution. *Paine* v. *Drew*, *H.* 44 *Geo.* III. 170

SERVANT and MASTER.
See MASTER and SERVANT.

SERVITIUM AMISIT.
See ACTION 170

SETTLEMENT *on Marriage*, *see* BANKRUPT, No. 1.

SETTLEMENT,
By Hiring and Service.

1. A pauper hired for a year at the wages of 45*s.* and two pounds of wool, if she behaves well, is dismissed by her master at the end of eight months, on a dispute arising between them; she applies to a magistrate, who upon hearing the matter, orders that the master shall take her into his service again, or pay her a year's wages; the servant consents to return; the master refuses to take her; and pays the wages for the year, without the wool. She afterwards applies to be hired to other persons within the year: held, this is a dissolution of the contract, within the year, and the servant gains no settlement under it. *Rex* v. *the Inhabitants of King's Pyon*, *M.* 44 *Geo.* III. 51

2. A pauper settles at *S.* is afterwards hired for a year in another parish; he serves a part of the year, and then being too ill of a fever to do his work, his master pays him his whole year's wages, and he quits his service and goes to an hospital: Held, this is a dissolution of the contract, and

that no settlement is gained. *Rex* v. *the Inhabitants of Sudbrooke*, *M.* 44 *Geo.* III. 55

3. Where there is a hiring at weekly wages, and nothing is said as to the term, the hiring will be held weekly, as the wages. In this case there were other circumstances in corroboration of a weekly hiring, particularly the servant's obtaining an occasional increase of his wages, as the summer or winter came, upon an application by the servant to the master, and without any previous running contract or stipulation for any time. *Rex* v. *the Inhabitants of Puchlechurch*, *T.* 44 *Geo.* III. 552

4. Evidence of the relief of a pauper's father and his family by the overseers of the poor of parish *A.* forty years back, the pauper being thirty-eight years of age, and such paupers so relieved, being resident in another parish *B.* at the time, so as to negative their being relieved by the parish *A.* as casual poor, is evidence of the settlement of the pauper, notwithstanding the pauper was born at another parish. *Semble*, the place of birth is the slightest possible evidence of settlement; it is only evidence of the local residence of the mother at the time. *Rex* v. *the Inhabitants of Wakefield*, *T.* 44 *Geo.* III. 512

5. A pauper hired a tenement of 11*l.* a year value, and resided upon it for a year and upwards; before he hired it, he agreed with another person to be his undertenant of a part at 5*l.* per annum, who became guarantee to the landlord for the whole of the rent: Held, that a settlement was gained by the pauper; notwithstanding the sessions found that credit was only given to the pauper for 6*l.* per annum, and he had continued to receive relief from his former parish for six months. *Rex* v. *the Inhabitants of Hooe*, *M.* 44 *Geo.* III. 60

6. A pauper residing on a cottage and half an acre of land, under a lease for three lives, at 1*s.* rent, for which he had given two guineas by way of fine, is not removeable, though he become chargeable. His application for relief is not a consent to be removed. *Rex* v. *the Inhabitants of Martley*, *E.* *Geo.* III. 322

7. A pauper rented a tenement of 8*l.* 10*s.* and also a toll for all cattle sold at the borough of *Chipping Norton*, which he took of the corporation of the said borough, at a court leet, by verbal agreement. Held, that the demise not being by deed, the pauper had not a good legal title to the toll, and so had not a tenement of 10*l.* per annum. *Rex* v. *the Inhabitants of Chipping Norton*, *T.* 44 *Geo.* III. 502

8. The stat. 13 *Geo.* III. c. 84, s. 56, which enacts that no person keeping a turnpike-gate, renting tolls, and residing at the toll-house, shall thereby gain a settlement in such parish, does not prevent such person from gaining settlement there by other means. *Rex* v. *the Inhabitants of Denbigh*, *T.* 44 *Geo.* III. 508

SHERIFF.

See PRACTICE, No. 7. WRIT, No. 1. SEQUESTRATION, No. 2.

SHIP REGISTER ACTS.

1. The statute 34 *Geo.* III. c. 68, s. 15 and 16, applies to any alteration of property in a ship, whether in the whole or part thereof; and if the whole of a ship at sea be so transferred to a purchaser at another port, who intends to obtain a register *de novo* at such other port, he must comply with the forms prescribed in the 16th section of that statute. *Bloxam* v. *Hubbard*, *T.* 44 *Geo.* III. 487

STAMPS.

STATUTES.

29 *Car.* II. c. 4, s. 4 (frauds and perjuries) 299

3 and 4 *W.* and *M.* c. 14 (devisee) 66

8 and 9 *W.* and *M.* c. 15 (arbitration) 38

9 *Anne*, c. 14, s. 3, 4 (money lost at play—Discovery, bill of) 121
7 *Geo.* I. c. 31, s. 1 (Bankrupt) 281
3 *Geo.* II. c. 26, s. 4. (coals, sale of one sort for another) 64
5 *Geo.* II. c. 30 (bankrupt) 281
7 *Geo.* II. c. 8 (Stock jobbing) 293, 306
18 *Geo.* II. c. 34 (bill of discovery) 122
19 *Geo.* II. c. 35, s. 11 (coal waggon and meter's ticket) 417
31 *Geo.* II. c. 3, s. 6 (selling plate above 5 dwts.) 49
34 *Geo.* III. c. 9 72
——— c. 79 81
38 *Geo.* III. c. 52, s. 12 (*recognizance*—removal of indictment—certiorari) 32
39 and 40 *Geo.* III. c. 104, s. 5 (pub. loc. acts) London court of conscience 234
43 *Geo.* III. c. 46, s. 2 (BAIL, *deposit in Lieu of*) 13
Ibid, s. 3 (costs to defendants. *See* COSTS. 428

STOCK JOBBING.

1. In an action on the 7 *Geo.* II. c. 8, for a compensation for stock agreed to be sold to the defendant, and not received by him, the plaintiffs proved a contract for the resale to another person before the action brought, and an actual transfer after the commencement of the suit: Held, that the action will not lie till after an actual transfer of the stock, although the transfer in this case was delayed only on account of the stock being shut at the time.—The actual transfer is the security to which the legislature looked for the prevention of gambling transactions, otherwise many contracts might be made of the same stock upon this pretence, and the act be evaded. *Heckscher* v. *Gregory*, *E.* 44 *Geo.* III. 293

2. On a sale of stock, the plaintiff, in an action on the 7 *Geo.* II. c. 8, s. 6, must prove an actual tender to transfer, and a refusal by the defendant to accept, or that he the plaintiff attended at the close of the books on the day when the transfer is to be made, at the place of transfer, which is the only thing equivalent to an actual tender and refusal. *Semble*, that the resale or repurchase of the stock, in case of default in performing a contract for stock, to be made under the 7 *Geo.* II. c. 8, s. 6 or 7, need nor be on the day that the transfer ought to have been made, on the original contract, nor on the next day; but that it is sufficient if it be made with reasonable promptness, and that the amount of the damage is not strictly confined to the price contracted for, and the price on the resale; but may be estimated by the jury, taking into consideration whether the plaintiff might and ought to have sold earlier, and at a price more advantageous for the defendant. But the Court thought this point unfit to be decided in the the present case. *Bordenave* v. *Gregory*, *E.* 44 *Geo.* III. 306

3. Action for not accepting stock; —The plaintiff tendered the stock on the day agreed on for making the transfer, and the defendant refused to accept it: Held, that the plaintiff need not wait till the end of that day, but may sell the stock to a third person immediately after the tender and refusal. *Dorrieus* v. *Hutchinson*, *T.* 44 *Geo.* III. 420

STOPPAGE IN TRANSITU.
See BILLS OF LADING, No 1.

SUBPŒNA.
See PRACTICE, 10.

SURRENDER, *Conditional, of Copyhold.*
See COPYHOLD, No. 2.

TENANT IN COMMON.
See TROVER, 1.

TENDER.
See STOCK-JOBBING.

TITLE, when to be made.
See DEVISE, 8.

TITHES, SINGLE VALUE OF.
See LONDON COURT OF CONSCIENCE.

TRADE *carried on after testator's death.*
See BANKRUPT, 5.

TRESPASS.

1. A warrant by a justice of the peace for the county of *Kent*, "directed to the constable of the half hundred of *Gillingham*, to seize the goods of *A. B.*" is not, *upon the face of it*, an authority for the constable to take the goods of *A. B.* in a place, situate locally within the half-hundred of *G.* but being within the jurisdiction of the *Cinque Ports*; and therefore, upon trespass brought, the warrant is not a justification to the constable, nor is it necessary that the justice should be sued in his stead, under the 24 *Geo.* II. c. 44. *Semble*, it would be otherwise if the warrant had directed the constable to seize the goods in a particular place within the jurisdiction of the *Cinque Ports*, and not in the jurisdiction of the magistrate. *Milton* v. *Green*, *T.* 44 *Geo.* III. 402

TRIAL.
See VENUE.

TRIAL, NEW.
See ASSUMPSIT, No. 7.

1. The attorney for the defendant, being under-sheriff, and having summoned the jury is, no ground for a new trial after a verdict for the defendant in a case of contradictory evidence. *Semble*, the plaintiff should take advantage of it by challenging the array at the trial. *Mason* v. *Pickery*, *E.* 44 *Geo.* III. 304

TOLL.

1. Proof of *toll thorough*, by prescription, for all merchandize and goods carried for hire, and paid for all packs carried by horses, and also on all goods carried in carts and waggons for hire, coming into the city of *Carlisle*, is evidence of toll due for goods carried for hire in a stage coach; the toll being substantially for goods carried for hire, it is immaterial in what kind of vehicle they are carried. The *Mayor*, &c. of *Carlisle* v. *Wilson*, *E.* 44 *Geo.* III. 297

TROVER.
See EXECUTOR DE SON TORT.

1. *See* BANKRUPT, No. 7. or *Bloxam* v. *Hubbard*, *T.* 44 *Geo.* III. 487

2. *A.* purchases and ships goods for *B.*, and sends a bill of lading, unindorsed, to him. The goods are received by *B.*, who sends the bill of lading to *C.* to satisfy a debt; he gets possession of them; *B.* then becoming bankrupt, *A.* sends the bills of lading indorsed to his correspondent, to secure the amount of the bill drawn on *B.* on account of the goods: Held, that *B.* has only the right of stopping *in transitu*, and the indorsee of the bills of lading cannot maintain *trover* for the goods. Bills of lading pass the property in goods, only when for a valuable consideration, and without notice of a prior claim, and are not analogous in all respects to bills of exchange. An agent who purchases goods for another has the same right of stopping *in transitu* as the original seller. *Coxe* and *Others* v. *Harden*, *M.* 44 *Geo.* III. 20

3. A mortgagor, and mortgagee of manors, &c. in fee, convey the same and all the estate, &c. by lease and release, to a purchaser: in the conveyance is contained a covenant from the purchaser, that the mortgagor, his heirs and assigns, may enter and dig for coal, and other mineral, and take the same to their own use: Held, that this is only a liberty, and the heirs of the mortgagor cannot bring trover against the tenants of the land for coal dug there, under a lease of the coals from the owner of the soil. Also, that it is not a reservation or exception by the mortgagor, out of his estate, for

at the time of making the conveyance, he had only the equity of redemption, and no legal estate out of which to make such reservation. *Chetham* v. *Williamson*, *H.* 44 *Geo.* III. 279

USAGE.

See TOLL. CORPORATION, &c.

USURY.

1. Where the drawer of an accommodation bill took usurious interest of the acceptor, under the false pretence that the person who afterwards discounted it (the first indorsee) required such interest, and there was a non-suit in an action by the first indorsee against the acceptor, on the ground of usury, the court granted a new trial, in order that the jury might decide who was the original lender of the money, whether the drawer or the first indorsee. *Lambe* v. *Sizeman*, *T.* 44 *Geo.* III. 431

VENUE.

See PRACTICE, No. 1. or 123.

1. In an action on the 3 *Geo.* III. c. 26, s. 4, imposing a penalty on persons selling one sort of coals for another, a contract was proved in Middlesex for the sale of Wall's End coals, without specifying a particular parcel, and the defendants afterwards fraudulently delivered other coals to the vendee in London: Held, that the sale not being complete until delivery, the venue should be in London. In the same case the coals delivered were deficient in quantity, there not being three lawful bushels, of the bushel of 12 *Anne*, put into each sack: Held, that under the 13th section of the statute 3 *Geo.* II. c. 26, the true quantity should have been put into the sacks in Middlesex, where they were filled; and this being a local omission of a local duty, the venue in a count for this offence should be laid in Middlesex. *Butterfield qui tam* v. *Windle*, 44 *Geo.* III. 66

VOLUNTEER CORPS.

1. A volunteer enrolled under an offer of service referring to the acts 38th Geo. III. c. 31. and 42d *Geo.* III. c. 66, may resign at pleasure, notwithstanding the provisions of 43 *Geo.* III. c. 121, or any other statutes previous thereto. *Rex* v. *Dowley*, *H.* 44 *Geo.* III. 153

WARD.

See GUARDIAN.

WARRANT OF JUSTICE.

See TRESPASS.

WARRANTY.

See INSURANCE.

1. Where on the purchase of a horse, the vendor had given a warranty of soundness generally, and the servant who was sent with the receipt to the agent of the other party, inserted, at his request, but without a special or general authority from his master, warranted sound "to the regiment:" Held, that the master was not bound by this alteration of the warranty, notwithstanding the money afterwards came to his hands. *Strode* v. *Dyson*, *T.* 44 *Geo.* III. 400

WAGES.

See ASSUMPSIT. MASTER AND MARINER OR, EMBARGO.

WEST INDIA DOCKS.

See ACTION.

WILL.

1. *A.* by will duly executed, devises lands to *B.* and *C.* in trust; he afterwards makes a codicil, unattested, appointing two other persons trustees and executors, in the place of *C.*, and strikes out his name, and inserts their names instead, and makes some other alterations in the will: Held, that the obliteration of the name of *C.*, being for the purpose of inserting other names, and only to make the

former trust void in case the alterations could take effect, it did not amount to a revocation; at least, that the trust to *B.* continued, notwithstanding the alteration: *Short d. Gastrell* (widow) v. *Smith*, *M.* 44 *Geo.* III. 96

WITNESS.

1. Pending an action at law the defendant files a bill against the plaintiff for a discovery of monies paid to him, praying also an injunction, which being obtained, is afterwards dissolved, upon the answer denying those payments. The plaintiff in equity then prosecutes an indictment against the plaintiff at law for perjury in his answer: Held, that the prosecutor is a good witness to prove the perjury, for he cannot make use of the conviction to his own advantage either in the action at law or in the suit in equity. *Rex* v. *Boston*, *H.* 44 *Geo.* III. 202

2. Habeas Corpus granted to bring up a prisoner, confined for non-payment of a fine to the king, and also for debt, in order to give evidence before a committee of the *House of Commons*, he being summoned for that purpose by the speaker's warrant. The rule in such case must be served on the person who would be liable for an escape, and also on the persons who might proceed against him in case of an escape. In re Sir *Edward Price*, Bart. 284

3. How his evidence is to be received by the jury, as being true or false, in whole or in part, *See* ASSUMPSIT, No. 7.

WRIT OF RIGHT.

See RIGHT WRIT OF.

WRIT INFORMAL RETURN IN.

See PRACTICE, 18.

1. Rule to return writ expiring in the vacation, the sheriff has till the next term to return it. Q. if he has not three days in that term. *Anonymous*, *T.* 44 *Geo.* III. 427

WORDS, MEANING OF.

See UNTIL. FREEHOLD. COPYHOLD. INSURANCE, RECOVERY.

ERRATA.

Page 409, *Madge* v. *Fear*. For *Semble*, &c. in the head note, read, *Semble*, The jury cannot give credit to a part of the testimony of a *single* witness, (i. e. where his testimony is neither supported nor contradicted by any other witness,) and reject other parts of his testimony equally uncontradicted or supported. The statement of the same point in the *Index*, ACTION 7, &c. must be understood with the like limitation.

Page 483, *line* 3, for 'liability of carrying,' *read* "liability of carriers."

W. Flint, Printer, Old Bailey.

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